(19,038.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 387.

HENRY MUHLKER, PLAINTIFF IN ERROR,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 24th day of February, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, February 25th, 1903.

b HENRY MUHLKER, Respondent-Appellant,
ag'st
THE NEW YORK AND HARLEM RAILROAD COMPANY and Another, Appellants-Respondents.

Be it remembered, that on the 2nd day of July in the year of our Lord one thousand nine hundred and one, The New York and Harlem Railroad Company and another, appellants-respondents in this action came here into the court of appeals, by Ira A. Place, their attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court in and for the first judicial department. And Henry Muhlker the respondent-appellant in said action, afterwards appeared in said court of appeals by Bushby & Berkeley, his attorneys, and also filed a notice of appeal herein.

Which said notices of appeal and the return thereto filed as aforesaid, are hereunto annexed.

c Whereupon, the said court of appeals having heard this cause argued by Messrs. L. M. Berkeley and James C. Bushby of counsel for the plaintiff, and by Mr. Ira A. Place of counsel for the defendants, and after due deliberation had thereon, did order and adjudge that the judgment of the appellate division of the supreme court appealed from herein be, and the same hereby is reversed and complaint dismissed without costs, on authority of the Fries case (169 N. Y. 270), that under the statute requiring the structure complained of the plaintiff has no remedy against this defendant, and the constitutionality of the statute being questioned it is further adjudged (1) that it does not violate the State constitution, (2) that it does not offend against that provision of the fourteenth amendment of the Federal Constitution providing that a person shall not be deprived of property without due process of law, and (3) that it does not contravene section 10 of article one of the

Federal Constitution forbidding the impairment of the obligation of a contract.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

d Therefore, it is considered that the said judgment be reversed and complaint dismissed without costs &c., &c., as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in sach case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of appeals, clerk's office.

ALBANY, *February 25th*, 1903.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the court of [SEAL.] appeals, with the papers originally filed therein attached thereto.

W. H. SHANKLAND, *Clerk.*

e In the Court of Appeals.

HENRY MUHLKER, Plaintiff, Respondent and Appellant,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants, Appellants and Respondents.

Case on appeal.

Bushby & Berkeley, attorneys for plaintiff, respondent and appellant, 220 Broadway, borough of Manhattan, New York city, N. Y.

Ira A. Place, attorney for defendants, appellants and respondents, Grand Central station, borough of Manhattan, New York city, N. Y.

Rec'd July 10, 1901.

BUSHBY & BERKELEY,
220 *B'dway.*

1 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff, Respondent and Appellant,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants, Appellants and Respondents.

Statement under Rule 41.

This action was commenced on the 7th day of January, 1897; the summonses and complaints were served on the defendants on that day. The answers of the defendants were served on the plaintiff on the 25th day of March, 1897.

The names of the original parties are as they appear in the above-entitled action in full. By an order entered herein October 22, 1897, Bushby & Berkeley were substituted for Ezra A. Tuttle and James C. Bushby, as the plaintiff's attorneys; by an order entered herein October 30, 1900, Ira A. Place was substituted for Frank Loomis, as the attorney for the defendants. No other change in parties or attorneys has taken place pending the action.

2 N. Y. Supreme Court, City and County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILroad Company and The New York Central and Hudson River Railroad Company, Defendants.

Trial Desired in New York County. Summons.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of such service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, this 18th day of December, 1896.

EZRA A. TUTTLE,
JAMES C. BUSHBY,
Plaintiff's Attorneys.

Office and post office address, No. 120 Broadway, New York city.

3 New York Supreme Court, City and County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Complaint.

The plaintiff, by Ezra A. Tuttle and James C. Bushby, his attorneys, complains of the defendants and alleges, upon information and belief, as follows:

I. Each of the defendants is a domestic corporation created and existing by and under the laws of the State of New York.

II. The plaintiff is and for many years has been the owner of the premises known as Nos. 77 and 79 E. 115th street and 1626 Park avenue, in the city of New York, being situated on the westerly side of Park avenue, beginning at the corner formed by the intersection of the westerly side of Park avenue with the northerly side of 115th street, and running thence northerly along Park avenue 76 feet and 5 inches, more or less. The plaintiff has occupied and been in possession of said premises by tenants for many years prior to the commencement of this action.

4 III. Park avenue is a public street, and plaintiff, as appurtenant to said premises, has certain rights and easements therein.

IV. The defendant The New York and Harlem Railroad Company is the owner of the railroad and structures hereinafter mentioned. Said defendant, on or about April 1, 1873, leased its said railroad and structures to the defendant The New York Central and Hudson River Railroad Company for a term of four hundred and one years.

V. Defendants, for more than six years past, have maintained upon that portion of Park avenue which is subject to plaintiff's easements as aforesaid a railway in a depression or cut, with solid walls of masonry extending many feet above the surface of said portion of said avenue; at the present time said railway is, and for more than six years past has been, operated by trains drawn by steam engines; and under the said lease it is and has been maintained and operated, as aforesaid, for the benefit of both defendants.

VI. In or about April, 1893, defendants began constructing, and have continued to construct, and have in part erected, and have since maintained, upon that portion of Park avenue which is subject to plaintiff's easements, as aforesaid, a permanent elevated railway structure of iron and steel, supported by columns of iron and steeel, standing on pedestals of masonry, with foundations embedded in the soil of said avenue; said structure is a new, special, additional and continuing injury to the plaintiff.

VII. By reason of the said acts of the defendants the plaintiff's said premises have been deprived of light air, access, ventilation, privacy, stability, quiet and other rights, and the easements appurtenant to said premises, as aforesaid, have been and are appropriated by the defendants; and the value both of said premises and of the use and occupation thereof has been largely depreciated thereby, to the damage of the plaintiff one hundred and fifty thousand dollars.

VIII. Defendants threaten and intend to make extensive additions to said elevated railway structure, and to enlarge and strengthen the same, and upon completion thereof to operate thereon trains of cars drawn by steam engines.

IX. Said additions to and enlargement of said elevated railway structure and the running of trains thereon, as aforesaid, will, to a still greater extent, deprive said premises of light, air, access, ventilation, privacy, stability, quiet and other rights; and the easements appurtenant to said premises, as aforesaid, will be still further appropriated by the defendants; and still greater and additional consequential damages will be inflicted upon said premises; and the injuries, hereinbefore described, will be greatly increased and intensified.

X. The injuries complained of are, and will be, constant and continuous trespass, and to prevent a multiplicity of suits, and to afford plaintiff adequate relief, the equitable interference of this court is necessary; said acts of the defendants have been, and are, and will be without warrant of law, without consent of plaintiff, and without compensation to him.

Wherefore, the plaintiff asks judgment:

(1.) That the defendants may be enjoined from using said elevated railway structure and said depression, and from continuing both or either opposite the said premises; and from doing any acts with respect to said elevated railway structure, except to remove the same; or that the court shall determine the amount of damages to the fee value of said premises in consequence of the appropriation by defendants of plaintiff's said easements, as aforesaid, amounting, as the plaintiff alleges, to one hundred thousand dollars and over, and that, unless the defendants shall forthwith pay the same to the plaintiff, the defendants be enjoined from using the said elevated railway structure and depression, and from continuing the same opposite the said premises.

(2.) That the plaintiff may recover from the defendants his damages for the loss and injury sustained by him from the year 1890 down to the time of the trial of this action by reason of the wrongful action of the defendants, hereinbefore referred to, which damages the plaintiff alleges amount to at least the sum of fifty thousand dollars.

(3.) And that the plaintiff may have such other and further relief

in the premises as may be just and proper, with the costs of this action.

EZRA A. TUTTLE,
JAMES C. BUSHBY,
Plaintiff's Attorneys.

Office and post office address, 120 Broadway, New York city.

7 CITY AND COUNTY OF NEW YORK, *ss:*

Henry Muhlker, the plaintiff in the above-entitled action, being duly sworn, says: That he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matter- therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

HENRY MUHLKER.

Sworn to before me this 18th day of December, 1896.

CHRISTOPHER J. LANE,
Notary Public (75), *N. Y. Co.*

8 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

First.

The separate answer of the defendant The New York and Harlem Railroad Company herein:

1. Admits the allegation of the complaint contained in the paragraph thereof numbered "I."

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint contained in the paragraphs thereof numbered "II.," "VII." and "IX."

3. Admits that certain portions of Park avenue are a public street, but denies any knowledge or information sufficient to form a belief as to each and every other allegation of the complaint contained in the paragraph thereof numbered "III."

4. Admits the allegation of the complaint contained in the paragraph thereof numbered "IV.," that this defendant The New York and Harlem Railroad Company is the owner of the railroad

9 extending from Forty-second street in the city of New York through the said Park avenue northerly to Chatham, and that heretofore and on or about April 1, 1873, this defendant leased its said railroad, and all structures and appurtenances thereof, to the

defendant The New York Central and Hudson River Railroad Company, but for the full purport and effect of the said lease this defendant begs leave to refer to the said lease with the same force and effect as if the said lease, or a copy thereof, were hereto annexed and formed a part of this answer.

5. Denies the allegation of the complaint contained in the paragraph thereof numbered "V." that the defendants for more than six years past have maintained upon that portion of Park avenue, which is subject to plaintiff's easements, a railroad, with solid walls of masonry extending many feet above the surface of said portion of Park avenue, but admits and alleges that defendants have for more than twenty years prior to the commencement of this action maintained a railroad over, through and upon a strip of land between Forty-second street and the Harlem river, and in front of the premises described in the complaint, on each side of which is a public street known as Park avenue, and that said railroad over certain portions of said strip of land is constructed in a depression or cut, and that said railroad is, and for many years past has been, operated by trains drawn by steam engines; that under the said lease from this defendant to the defendant The New York Central and Hudson River Railroad Company, said railroad has been maintained and operated by the defendant The New York Central and Hudson River Railroad Company, pursuant to the statutes of the State of New York in such case made and provided, and in accordance with the terms of the said lease.

6. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "VI."

7. Denies the allegation of the complaint contained in the paragraph thereof numbered "VIII.," that this defendant threatens and intends to make extensive additions to said elevated railway structure and to enlarge and strengthen the same, and upon completion thereof to operate trains of cars drawn by steam engines.

8. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "X."

9. Denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint not hereinbefore or hereinafter specifically controverted or admitted.

Second.

For a further, second and separate defense this defendant alleges, upon information and belief, that prior to the commencement of this action, and on or about the 31st day of October, 1891, Henry Muhlker, then the alleged owner of the premises described in the complaint herein, executed, duly acknowledged and delivered to Alice S. H. Davies, two mortgages upon portions of the premises described in the complaint herein to secure the payment of large sums of money, to wit, the sum of $20,000.00 and the sum of $15,000.00 respectively, with interest; that the said mortgages were duly recorded in the office of the register of the city and county of New York, and

that the same remains undischarged of record, and that the
11 owner thereof has not been made a party to this action, and that on or about the 24th day of October, 1891, Henry Muhlker, then the alleged owner of said premises, executed, duly acknowledged and delivered to Alice S. H. Davies, a mortgage upon the remaining portion of said premises to secure the payment of a large sum of money, to wit, the sum of $20,000.00, with interest; that the said mortgage was duly recorded in the office of said register, and that the same remains undischarged of record, and that the owner thereof has not been made a party to this action.

For a further and separate defense, that on or about the 28th day of April, 1892, the plaintiff herein commenced an action as plaintiff in the supreme court, New York county, by Joseph Ullman, his attorney, against the defendants, for an injunction and damages, by reason of the defendants' railroad structure and the operation of trains thereon in Park avenue opposite that portion of the premises described in the complaint situated on the northwest corner of Park avenue and 115th street, having a frontage of 77 feet on Park avenue and of 26 feet on 115th street; that the said action is at issue and pending and undetermined; that the relief sought in said action, and the alleged facts upon which such claim for relief is founded, are in part identical with the plaintiff's claim for relief and with the alleged facts upon which such claim is founded in this action.

Third.

For a further third and separate defense the defendant The New York and Harlem Railroad Company alleges upon information and belief:

That pursuant to the provisions of an act of the legislature
12 of the State of New York, entitled "An act relative to improvements, touching the laying out of streets and roads in the city of New York and for other purposes," passed April 3d, 1807, and known as chapter 115 of the Laws of 1807, a map or plan exhibiting the public streets and avenues of the city of New York was duly made and filed April 1, 1811, exhibiting among other avenues, Fourth avenue, of the width of one hundred feet, extending from the southerly side of the Harlem river to and below Forty-second street.

That by the provisions of an act of the legislature, entitled "An act to incorporate the New York and Harlem Railroad Company," passed April 25th, 1831, and known as chapter 263 of the Laws of 1831, the defendant The New York and Harlem Railroad Company was incorporated and was authorized, among other things, to construct a railroad from any point on the north bounds of Twenty-third street to any point on the Harlem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, and that pursuant to the requirements of said act the defendant The New York and Harlem Railroad Company, duly located the route of said railroad and made a survey of such loca-

tion and filed a map thereof in the register's office of the city and county of New York on the 22d day of October, 1831, the said map having been approved by a joint resolution of the common council, approved by the mayor, October 11, 1831, declaring their approval of the map and of the route of said railroad indicated thereon; that said railroad, as located as aforesaid, occupied a strip of land twenty-four feet in width extending from Twenty-third street to the Harlem river, the centre line of said strip coinciding with the centre line of Fourth avenue as laid down on said map, filed April 1, 1811.

That subsequently, and on the 22d day of December, 1831,
13 the mayor approved an ordinance passed by the board of aldermen on the 16th day of December, 1831, and by the board of assistants on the 19th day of December, 1831, granting permission to said New York and Harlem Railroad Company to construct a railroad from Twenty-third street to the Harlem river, along Fourth avenue, in conformity with said map, and that said company, by articles of agreement executed January 9th, 1832, duly covenanted to perform all the conditions and requirements contained in said ordinance.

That after the incorporation of the defendant The New York and Harlem Railroad Company, and prior to the acquisition by the city of New York of any title to any part of Fourth avenue, north of Forty-second street, the defendant The New York and Harlem Railroad Company acquired title in fee for the purpose of constructing and operating its railroad thereon to a strip of land extending southerly from the southerly line of the Harlem river to Forty-second street, a portion whereof is in front of the premises described in the complaint, of the width of twenty-four feet, situate within the exterior lines of Fourth avenue, as designated on said map or plan, the centre line thereof coinciding with the centre line of said Fourth avenue, and also the right to slope any embankment or excavation of its railroad structure to the exterior lines of the said Fourth avenue; and that many years prior to the acquisition of any title by the city of New York to any part of Fourth avenue, the defendant The New York and Harlem Railroad Company, had constructed its railroad structure and had in operation its railroad upon the same, and its roadway acquired as aforesaid, and upon, along, above and
below the grade of the adjacent land, and continued the op-
14 eration of its railroad upon its railroad structure, as so located and constructed, until the changes required by the provisions of chapter 880 of the Laws of 1867, and by the provisions of chapter 702 of the Laws of 1872, as hereinafter set forth, were successively made.

That pursuant to the provisions of an act of the legislature, passed upon the memorial of the mayor, aldermen and commonalty of the city of New York, therefor, and entitled "An act to alter the map or plan of the city of New York," passed April 27th, 1837, and known as chapter 274 of the Laws of 1837, said Fourth avenue was widened to the width of one hundred and forty feet, and the said widening

from one hundred to one hundred and forty feet was by reason of the location and characteristics of the railroad and railroad structures theretofore built by the defendant The New York and Harlem Railroad Company, extending between Forty-second street and the Harlem river, and was for the purpose of giving an avenue of the necessary width for the increasing needs and population of the city of New York.

That the aforesaid acquisition of title by said defendant, The New York and Harlem Railroad Company, with the right to slope any embankment or excavation for its railroad structure to the exterior lines of said Fourth avenue, at that time one hundred feet in width as aforesaid, and the aforesaid construction by this defendant The New York and Harlem Railroad Company, of its railroad structure, and the aforesaid operation of its railroad upon the same and its roadway, was many years prior to the alleged acquisition by the plaintiff of title (if he acquired any title) to the premises described in the complaint, and to the erection of any building or buildings on said lands, and such acquisition of title, right of construc-
15 tion and operation of said railroad was pursuant to and by authority of said act of incorporation of said defendant The New York and Harlem Railroad Company, and of the acts amendatory thereof and supplemental thereto, and with the consent and acquiescence of the predecessor or predecessors in title (if the plaintiff has any) of the plaintiff.

That pursuant to the provisions of section six of an act of the legislature entitled, "An act to amend an act entitled 'An act relating to the New York and Harlem Railroad Company,' passed May 7, 1840, and the acts amending the same," passed March 29th, 1848, and known as chapter 143 of the Laws of 1848, the New York and New Haven Railroad Company (now known as the New York, New Haven and Hartford Railroad Company), a railroad corporation organized under the laws of the State of Connecticut, acquired from said defendant The New York and Harlem Railroad Company, the right to run the cars of the said New York and New Haven Railroad Company upon the tracks of said defendant The New York and Harlem Railroad Company, from a point of junction near Williams bridge, to and into the city of New York, and did, and ever since the year 1848 has, run its cars and trains upon the railroad of said defendant The New York and Harlem Railroad Company, from said point of junction to and along and upon said tracks from the southerly side of the Harlem river to Forty-second street.

That by proceedings instituted by the mayor, aldermen and commonalty of the city of New York, in or about the year 1850, for the opening of Fourth avenue (now known as Park avenue) from Thirty-eighth street to the Harlem river, resulting in an order of confirmation entered October 29th, 1853, the said city assumed to ac-
16 quire title to the land between the exterior lines of Fourth avenue from Thirty-eighth street to the Harlem river, subject, nevertheless, to all the rights of the defendant The New York

and Harlem Railroad Company, to maintain and operate its said railroad in said avenue.

That on the 10th day of May, 1867, the legislature passed an act entitled "An act for the protection of persons traveling upon Fourth avenue in the city of New York," and known as chapter 880 of the Laws of 1867, which in terms required and provided that the defendant The New York and Harlem Railroad Company should do certain work and perform certain acts, and among other things, that it should erect retaining walls upon the sides of its railroad below Ninety-second street, and between Seventy-eighth and Eighty-eighth streets, surmount said retaining walls with iron railings, and arch over its roadway from Eighty-eighth street to Ninety-second street, and that the city of New York should pay to the defendant The New York and Harlem Railroad Company one-half of the expense thereof, and that the filling in and grading about the said arch should be done by the city of New York, at its sole expense; and this defendant alleges that all the work and acts required to be done by said last mentioned act were duly performed.

That on the 14th day of May, 1872, the said legislature passed an act entitled "An act to improve and regulate the use of Fourth avenue in the city of New York" and known as chapter 702 of the Laws of 1872, whereby an established statutory grade and roadway between Forty-fifth street and the Harlem river were provided for the said railroad of the defendant The New York and Harlem Railroad Company, and whereby said defendant was required to con-
17 struct such viaducts, foot and road bridges over the same and such excavations and tunnels under the same, with openings for proper ventilation, as should be required by the plans and specifications of a board of engineers appointed by said act to execute, direct and superintend the said improvement; and also requiring one-half the cost of said improvement to be paid by the city of New York. That said improvement was accordingly carried out and the requirements of said act fully complied with and the railroad structure mentioned in the complaint as existing in front of the premises described in the complaint prior and up to the month of April, 1893, was constructed and has since been maintained and operated by the defendants pursuant to said last mentioned act.

That on the first day of April, 1873, said defendant The New York and Harlem Railroad Company leased all of its railroad from Forty-second street northwardly to the defendant The New York Central and Hudson River Railroad Company for a term ending April 1st, 2274, and that the said defendant The New York Central and Hudson River Railroad Company entered into possession and is now in the sole occupation and enjoyment of the said demised premises.

That on the 19th day of April, 1892, the said legislature passed an act entitled, "An act to regulate, improve and enlarge Park avenue above 106th street, in the city of New York, and providing for the passage of intersecting streets under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of

said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by
18 reason of such change in structure and grade and increased elevation of bridges, and for other purposes," and known as chapter 339 of the Laws of 1892; that said act was duly amended by an act of said legislature, passed May 8th, 1894, and known as chapter 548 of the Laws of 1894, and was also further amended by an act of said legislature passed May 13th, 1896, and known as chapter 594 of the Laws of 1896.

That under and pursuant to the provisions of section 13 of said act, chapter 339 of the Laws of 1892, the board therein designated as "the board for the Park avenue improvement above One hundred and sixth street," was duly appointed by the mayor of the city of New York, on or prior to the 29th day of April, 1892, was duly organized as required in said act on that date, and thereupon proceeded to and took entire charge and control of the improvement directed in said act, and still has entire charge and control of the same; that pursuant to the authority vested by said act as amended as aforesaid, and in obedience to its explicit directions, the said board entered into and executed certain contracts with various parties for the construction and carrying out of said improvement, according to certain plans prepared by said board, approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, and that all the structures described in the complaint, including all temporary structures, required in the construction of said improvement, or necessary for the operation of trains during the making of said improvement, have been erected by such contractors under the sole supervision and control of said board, and in part at the expense of the mayor, aldermen and commonalty of the city of New
19 York, as required by said act as amended as aforesaid, and that all the provisions of said chapter 339 of the Laws of of 1892, as amended, have been and are being duly carried out and executed.

That all the changes in the original railroad bed and structures of the defendant The New York and Harlem Railroad Company, which have been or are being made, including all temporary structures, were and are necessary and requisite in order to carry out the provisions of the said acts, and were necessary and required for the purpose of and in order to regulate, improve and enlarge Park avenue in accordance with the provisions of the said acts, and that the defendant The New York and Harlem Railroad Company, has not operated any trains on said structure, or any part of it, temporary or otherwise.

Fourth.

For a further fourth and separate defense the defendant The New York and Harlem Railroad Company alleges, upon information and

belief, that for the pretended injuries or causes of action alleged in the complaint the plaintiff has a complete and adequate remedy at law, and that the plaintiff has no right to invoke the equitable interference of this court.

Fifth.

For a further fifth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to — predecessor or predecessors in title within twenty years next preceding the commencement of this action.

Sixth.

For a further sixth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to — predecessor or predecessors in title within ten years next preceding the commencement of this action.

Seventh.

For a further seventh and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to — predecessor or predecessors in title within six years next preceding the commencement of this action.

Eighth.

For a further eighth and separate defense the defendant The New York and Harlem Railroad Company alleges:

That it entered into possession of that part of Park (formerly Fourth) avenue in front of, or adjacent to, the premises claimed to be owned by the plaintiff, which is now and heretofore has been occupied by the railroad and railroad structure of the defendant The New York and Harlem Railroad Company, under a claim of title, exclusive of any other right, founding such claim upon a written instrument or instruments as being a conveyance or conveyances of said premises or of the right, franchise and easement to construct, maintain and operate railroads thereon, and that there has been a continued occupation, possession and use of the said franchises, rights and easements included in said written instrument or instruments, or of some part thereof, by the defendant The New
21 York and Harlem Railroad Company, and the defendant The New York Central and Hudson River Railroad Company, under said lease, for twenty years next preceding the commencement of this action, under the same claim.

Wherefore, the defendant The New York and Harlem Railroad Company demands that the complaint be dismissed, with costs.

FRANK LOOMIS,
Attorney for the Defendant The New York and Harlem Railroad Company.

Office and post office address, room 10, Grand Central depot, 42d St. and Vanderbilt Ave., New York city, N. Y.

COUNTY OF NEW YORK, *ss:*

Edward V. W. Rossiter, being duly sworn, says that he is the treasurer of The New York and Harlem Railroad Company, the above-named defendant; that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. V. W. ROSSITER.

Sworn to before me this 23d day of March, 1897.

H. B. DWYER,
Notary Public, New York County.

The separate answer of the New York Central and Hudson River Railroad Company contains substantially the same allegations as the separate answer of the New York and Harlem Railroad Company.

22 New York Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Decision.

The issues in the above-entitled action having been tried at a special term of this court, held by the Hon. David Leventritt, justice, in the county court house of New York county, on the 8th and 10th days of October, 1900, and the respective parties having appeared by counsel, and the evidence presented having been duly heard and considered, the court makes this decision, stating concisely the grounds upon which the issues herein are decided, as follows:

First. That the plaintiff is, and since the year 1888 has been, the owner of a lot of land in the borough of Manhattan, city of New York, being situated on the northwesterly corner of Park avenue and 115th street, and having a frontage of 76 feet and 10 inches on said avenue, and of 26 feet on said street; that the plaintiff about the

year 1891 erected on said lot a five-story brick building, adapted for stores and dwelling purposes, and covering nearly the entire
23 lot aforesaid; and that the plaintiff has, and during the periods of his ownership, as aforesaid, had, as appurtenant to his said lot and building, certain easements of light, air, and access in and over said Park avenue in front of said premises.

Second. That the defendant The New York and Harlem Railroad Company is, and during all times herein mentioned was, the owner of the railroad and railroad structures, hereinafter described, in Park avenue in front of the plaintiff's said premises; that the defendant The New York Central and Hudson River Railroad Company is the lessee of said railroad and structures, under a lease dated April 1st, 1873, for a term of 401 years from said date; that said railroad prior to the year 1872 was operated on two tracks laid upon the surface of said avenue and along the centre thereof in front of said premises.

Third. That pursuant to chapter 702 of the Laws of 1872, certain changes were made in said railroad in front of said premises, between the years 1872 and 1878, whereby the number of tracks were increased from two to four; that said tracks were laid along the centre of said avenue, and at the south line of said premises were at the surface of said avenue and at the north line of said premises said tracks were laid in a trench about 5½ feet in depth below the surface of said avenue; that said railroad was bounded on both sides by masonry walls about 3 feet high above the surface of said avenue in front of said premises, cutting off access across said avenue immediately in front of said premises; that said defendant The New York Central and Hudson River Railroad Company in the year 1878 began to operate its trains over said last-mentioned railroad in front of said premises, and continued to maintain
24 and operate said railroad from said year down to February 16, 1897.

Fourth. That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March, 1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the centre by solid iron girders each 7 feet and 4 inches high, and is supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

Fifth. That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service

said defendant was paid; that said defendant on February 16th, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

Sixth. That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent
25 elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1897, but that neither of said defendants is liable for such damage.

Seventh. That the said permanent structure and the operation by said defendant The New York Central and Hudson River Railroad Company of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16th, 1897, down to October 10th, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10th, 1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

Eighth. That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said
26 premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

Ninth. That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

Tenth. That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendants for an injunction and damages by reason of the defendant's railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900.

The court direct the entry of judgment in favor of the plaintiff, as follows:

I. That the defendants The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, and each of them, and their officers, agents and servants, and all persons claiming under or through them, be enjoined from maintaining, or in any way using, their permanent elevated railroad structure and its appurt-ances in front of the plaintiff's said premises, described herein, and be further enjoined to take down and remove the same from in front of said premises, but said injunction shall not be operative for twenty days after service upon defendants' attorneys of notice of entry of judgment herein.

II. That in case the said defendants shall, at least five
27 days before the said injunction shall become operative, tender for the purpose of execution by the plaintiff, and by all other persons having any title to, interest in or lien upon the said premises, a form of conveyance and release to said defendants of the plaintiff's easements of light, air and access appurtenant to said premises, taken by the maintenance and use of defendants' said permanent elevated railroad structure, as the same is now maintained and used; and in case the plaintiff and all other persons having any title to, interest in or lien upon the said premises, shall execute such conveyance and release, and shall tender delivery thereof to the said defendants; and in case the said defendants shall thereafter pay or tender to the plaintiff's attorneys the sum of three thousand dollars ($3,000) with interest thereon from October 10th, 1900, then the said injunction shall not in any manner become operative; and in case the plaintiff fails to deliver, or tender for delivery, said conveyance and release, executed, as aforesaid, the said injunction shall not in any manner become operative.

III. That the plaintiff, Henry Muhlker, recover judgment against the defendant The New York Central and Hudson River Railroad Company for the sum of fourteen hundred dollars ($1,400), with interest from February 16th, 1897, together with the costs of this action, to be taxed by the clerk, and an additional allowance of one hundred and fifty dollars ($150), but that execution to enforce said money judgment shall be stayed until the expiration of twenty days after notice of entry of the same.

IV. That either party may move at the foot of the judgment to be entered herein for further direction as to the enforcement of the same.

Dated November 2d, 1900.

DAVID LEVENTRITT, *J. S. C.*

28 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Judgment.

The issues in the above-entitled action having been tried at a special term of this court, held by the Hon. David Leventritt, justice, in the county court house of New York county, on the 8th and 10th days of October, 1900, and the respective parties having appeared by counsel, and the evidence presented having been duly heard and considered, and the court, after deliberation, having duly made and filed, on the 3d day of November, 1900, a decision in favor of the plaintiff and against the defendants, stating concisely the grounds upon which the issues herein were decided, and directing the entry of judgment as hereinafter stated; and the plaintiff's costs having been duly adjusted at $122.35, it is

Adjudged and decreed as follows:

I. That the defendant- The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad
29 Company, and each of them, and their officers, agents and servants, and all persons claiming under or through them, be enjoined from maintaining or in any way using their permanent elevated railroad structure and its appurtenances in front of the plaintiff's premises, being situated on the northwesterly corner of Park avenue and 115th street, and having a frontage of 76 feet and 10 inches on said avenue and of 26 feet on said street, and be further enjoined to take down and remove the same from in front of said premises; but said injunction shall not be operative for twenty days after service upon defendants' attorneys of notice of entry of judgment herein.

II. That in case the said defendants shall, at least five days before the said injunction shall become operative, tender for the purpose of execution by the plaintiff and by all other persons having any title to, interest in or lien upon the said premises, a form of conveyance and release to said defendants of the plaintiff's easements of light, air and access appurtenant to said premises, taken by the maintenance and use of defendants' said permanent elevated railroad structure, as the same is now maintained and used; and in case the plaintiff and all other persons having any title to, interest in or lien upon the said premises, shall execute such conveyances and release, and shall tender delivery thereof to the said defendants; and in case the said defendants shall thereafter pay or tender to the plaintiff's attorneys the sum of three thousand dollars ($3,000) with interest thereon from October 10th, 1900, then the said injunction shall not in any manner become operative; and in case the plaintiff

fails to deliver or tender for delivery said conveyance and
30 release, executed as aforesaid, the said injunction shall not in any manner become operative.

III. That the plaintiff Henry Muhlker recover of the defendant The New York Central and Hudson River Railroad Company the sum of fourteen hundred dollars ($1,400), with interest from February 16th, 1897, and the further sum of one hundred fifty dollars ($150), amounting to eighteen hundred sixty-one and 88/100 dollars, together with costs and disbursements taxed at one hundred twenty-two and 35/100 dollars, amounting in the aggregate to nineteen hundred eighty-four and 23/100 dollars, and that the said plaintiff have execution therefor; but said execution shall be stayed until the expiration of twenty days after notice of entry of judgment herein.

IV. That either party may move at the foot of the judgment to be entered herein for further direction as to the enforcement of the same.

Judgment signed and entered this 3d day of November, 1900.

WM. SOHMER, *Clerk*.

31 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

Please take notice that the defendants, and each of them, hereby except to the decision filed herein on the 3d day of November, 1900, and to each and every part of the same.

Dated borough of Manhattan, New York city, November 5, 1900.

Yours, &c., IRA A. PLACE,
Attorney for Defendants.

Room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Bushby & Berkeley, Esqs., attorneys for plaintiff, 120 Broadway, New York city, N. Y. William Sohmer, Esq., county clerk of New York county, county court house, N. Y. city.

32 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD Company *et al.*, Defendants.
Plaintiff's Exception to Decision.

SIRS: Please take notice that the plaintiff above named hereby excepts to the decision made herein by the Hon. David Leventritt,

justice, filed in the office of the clerk of New York county on November 3d, 1900, and to each and every part of said decision.

Dated New York, December 14, 1900.

Yours, &c., BUSHBY & BERKELEY,
Attorneys for Plaintiff.

Office and post office address, 120 Broadway, borough of Manhattan, New York city.

To William Sohmer, Esq., clerk of New York county. Ira A. Place, Esq., attorney for defendants.

33 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILroad Company and The New York Central and Hudson River Railroad Company, Defendants.
} Notice of Appeal to Appellate Division.

Please take notice, that the defendants above named, and each of them, hereby appeal to the appellate division of the supreme court, first department, from the judgment in this action, entered and filed in the office of the clerk of the county of New York, on the third day of November, 1900, and from each and every part of said judgment.

Dated New York, November 17, 1900.

Yours, &c., IRA A. PLACE,
Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Bushby & Berkeley, Esqs., attorneys for plaintiff, 120 Broadway, borough of Manhattan, New York city, N. Y. William Sohmer, Esq., clerk of the county of New York, county court house, borough of Manhattan, New York city, N. Y.

34 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILroad Company *et al.*, Defendants.
} Plaintiff's Notice of Appeal.

SIRS: Please take notice that the above-named plaintiff hereby appeals to the appellate division of the supreme court for the first department from the judgment of this court, herein entered in the

office of the clerk of the county of New York on the 3d day of November, 1900, and from each and every part of said judgment.

Dated New York, December 14th, 1900.

Yours, &c., BUSHBY & BERKELEY,
Attorneys for Plaintiff.

Office and post office address, 120 Broadway, borough of Manhattan, New York city.

To Wm. Sohmer, Esq., clerk of New York county. Ira A. Place, Esq., attorney for defendants.

35 Supreme Court, Special Term, Part VI.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY *et al.*, Defendants. } Opinion.

LEVENTRITT, *J.*:

In this case, following Lewis *vs.* N. Y. & H. R. R. (162 N. Y., 202), as to the legal principles involved, the fee damage to plaintiff's premises, situate at the northwesterly corner of Park avenue and 115th street (26 ft. x 76 ft. 10 in.), is assessed at $3,000, and the rental damage from the 16th day of February, 1897, to the date of trial at $1,400. An extra allowance of $150 is granted. Follow the form of decision and judgment entered in the Lewis case.

36 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff, Respondent, and Appellant,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants, Appellants, and Respondents.

The issues thus joined were tried before the Honorable David Leventritt, justice, at a special term, part VI., without a jury, on the eighth and tenth days of October, 1900.

James C. Bushby, Esq., and L. M. Berkeley, Esq., appeared for the plaintiff.

Charles C. Paulding, Esq., and Thomas Emery, Esq., appeared for the defendants.

FREDERICK SONNENBURG, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I own property between 115th and 116th streets on the easterly side of Park avenue. My business is that of a merchant tailor.
37 My place of business is at the corner of Spring street and Broadway. I have owned the property on Park avenue

justice, filed in the office of the clerk of New York county on November 3d, 1900, and to each and every part of said decision.

Dated New York, December 14, 1900.

Yours, &c., BUSHBY & BERKELEY,
Attorneys for Plaintiff.

Office and post office address, 120 Broadway, borough of Manhattan, New York city.

To William Sohmer, Esq., clerk of New York county. Ira A. Place, Esq., attorney for defendants.

33 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILroad Company and The New York Central and Hudson River Railroad Company, Defendants.
} Notice of Appeal to Appellate Division.

Please take notice, that the defendants above named, and each of them, hereby appeal to the appellate division of the supreme court, first department, from the judgment in this action, entered and filed in the office of the clerk of the county of New York, on the third day of November, 1900, and from each and every part of said judgment.

Dated New York, November 17, 1900.

Yours, &c., IRA A. PLACE,
Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Bushby & Berkeley, Esqs., attorneys for plaintiff, 120 Broadway, borough of Manhattan, New York city, N. Y. William Sohmer, Esq., clerk of the county of New York, county court house, borough of Manhattan, New York city, N. Y.

34 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILroad Company *et al.*, Defendants.
} Plaintiff's Notice of Appeal.

SIRS: Please take notice that the above-named plaintiff hereby appeals to the appellate division of the supreme court for the first department from the judgment of this court, herein entered in the

office of the clerk of the county of New York on the 3d day of November, 1900, and from each and every part of said judgment.

Dated New York, December 14th, 1900.

Yours, &c., BUSHBY & BERKELEY,
Attorneys for Plaintiff.

Office and post office address, 120 Broadway, borough of Manhattan, New York city.

To Wm. Sohmer, Esq., clerk of New York county. Ira A. Place, Esq., attorney for defendants.

35 Supreme Court, Special Term, Part VI.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY *et al.*, Defendants. } Opinion.

LEVENTRITT, *J.*:

In this case, following Lewis *vs.* N. Y. & H. R. R. (162 N. Y., 202), as to the legal principles involved, the fee damage to plaintiff's premises, situate at the northwesterly corner of Park avenue and 115th street (26 ft. x 76 ft. 10 in.), is assessed at $3,000, and the rental damage from the 16th day of February, 1897, to the date of trial at $1,400. An extra allowance of $150 is granted. Follow the form of decision and judgment entered in the Lewis case.

36 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff, Respondent, and Appellant,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants, Appellants, and Respondents.

The issues thus joined were tried before the Honorable David Leventritt, justice, at a special term, part VI., without a jury, on the eighth and tenth days of October, 1900.

James C. Bushby, Esq., and L. M. Berkeley, Esq., appeared for the plaintiff.

Charles C. Paulding, Esq., and Thomas Emery, Esq., appeared for the defendants.

FREDERICK SONNENBURG, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I own property between 115th and 116th streets on the easterly side of Park avenue. My business is that of a merchant tailor.
37 My place of business is at the corner of Spring street and Broadway. I have owned the property on Park avenue

since perhaps 1892. I know the premises on the northwest corner of 115th street and Park avenue. I should say my house is about the same distance from the railroad structure in Park avenue as the premises in suit, but on the opposite side of the street. I am familiar with the conditions of the railroad as they existed prior to the elevation of the defendants' tracks. I do not live in the house; at the same time I go there occasionally. I know what the physical conditions are.

Q. State what the physical effects are that you have noticed on your premises from the elevation of the defendants' tracks and the operation of trains thereon?

Objected to as immaterial, irrelevant and incompetent.
Objection overruled. Exception to defendants.

A. There is a great many. First off, it takes a good deal of light away from the premises—the apartments in the front. Then the dust and smoke is so that the party in the front cannot keep the windows open at all, not alone from the dust, but from the noise. Noise is the principal part. Sometimes, if a train runs in the afternoon or in the morning quick, it is so noisy that it awakens the children from sleep, and often prevents us from renting the flats. Of course, I have had experience myself and tried to rent the flats in every way, but the railroad passes there, and it was so noisy that it interfered with our conversation, and I had to keep quiet until the trains passed.

Q. Where does the elevated structure come with reference to your apartments—on a level with what floor?

Objected to as immaterial, irrelevant and incompetent.
38 Objection overruled. Exception to defendants.

A. About the third floor.

Q. Do you know where it comes with reference to the plaintiff's house?

A. I have not been inside of his house, but I should say—my house is a little bit higher, I think. I think at mine it is very near the fourth floor, though, and his comes a little lower. My house is about opposite the plaintiff's premises, so that the structure comes about the same. I think my house goes up between 115th and 116th streets, and it is a little higher there. The structure is in front of some of the plaintiff's apartments and in front of some of mine.

Q. Will you state whether or not the passengers on the cars of the defendants' trains can look into the windows of your rooms?

Same objection, ruling and exception.

A. I have had complaints about that many times. It is not very pleasant to have them look in. I have noticed as to the vibration of my building when trains pass. When a train passes it jolts sometimes. If you sit on a chair you can see the movement in the mirror—not exactly a move, but it shakes.

There was no interference with my light from the passenger trains when they were run in the trench; passengers could not then look into my window; I did not notice any vibration of the building then, nor any cinders, dust or smoke in the upper apartments. We had a little smoke occasionally. It was according to what direction the wind comes from. If we had a window open it might have been brought in; but I had no trouble with the light, and no noise, and nothing at all, because it did not interfere with anything.

39 Cross-examination—In answer to defendants' counsel:

I have a suit pending against these companies for damages and Mr. Bushby is my attorney.

I have owned that property since 1892 or 1893—I really could not tell. I do not live there; I do not live on Park avenue at all. I go to my property sometimes twice a week and sometimes I may not go there in a week or two weeks. The last time I was there was this morning; I always go there to collect the rents of the house, because I have no agent. This morning I was there only a short time, because I had to be here in court. I stay there sometimes for half a day when I have men there to paint. Besides, some time ago I put a brother of mine in the place in one of the apartments, and I have stayed there a whole evening, and have been there nights sometimes until 10 or 11 o'clock. I have observed the noise when I have been there in the evening. The noise was very great just at the time the trains passed.

Q. Was that the chief objection?

A. Well, there was a great many—the light. Parties living in the house objected to a great many things. Because of the dust they could not keep the windows open, and the darkness, and then the noise awakened the children from sleep. The dust got in all of the floors except the ground floor. This is dust from the engines. I did not examine the dust. I saw dust get in there; it is dark; what it comes from I don't know, and what it is I did not examine. It don't come in in such lumps that I can examine it to see what — is.

The trains on the structure come up to my third story. Smoke does not always come in the apartments from the trains. I have seen the smoke stain the windows. When the windows are
40 open the smoke gets in the upper apartments. In the old structure I got smoke in my apartments. The smoke went up, too, just the same. I did not get that in all the apartments. We had a little smoke before, too, on the old structure, occasionally, but not as much as now. I cannot explain why, but I suppose that is on account that the trains run open now and more dust comes in now.

MARIA F. MAXWELL, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I live at 1626 Park avenue, in plaintiff's house, on the northwest corner of Park avenue and 115th street. I moved in there the eighth day of November, 1896. I occupy the top floor south, and have continued to occupy that apartment since I moved in the premises. When I first took the apartment I paid $17.00 a month rent. When I moved in there there was an iron railroad structure in front of the premises, and there was a temporary structure of wood. I do not think trains ran on the structure until two or three months after. Construction trains were run on there then.

It is stipulated that regular trains commenced to run on this structure February 16, 1897.

My rent was reduced by the plaintiff. When I had been there about three or four months I decided to move, and I spoke to Mr. Muhlker about it, and he reduced the rent $1 and I paid $16. At the time this reduction was made I spoke to Mr. Muhlker about the railroad structure in front of the premises.

Trains are now run on this structure in front of my apartments.

I have never noticed anything as to the effect of the structure
41 and the running of trains in reference to the light in my apartments. The structure is a little below my apartment. I have noticed as to dust and cinders.

Q. State what you have noticed.

A. Everything in the house gets all black flecked if we leave them out any length of time. Even the bedding is all covered with little black flecks. On Saturday night last we had some things out on the fire-escape, some celery, and the black flecks was ground into the celery, and all around in the roots of the celery.

The trains are certainly very noisy.

Q. What effect does that have upon conversation?

A. We close the windows. There are times when four trains pass, two in each direction, and certainly that makes a great noise, and we cannot hear each other speak, and then we raise our hands and make a motion to stop until the trains pass.

I pay $17 per month rent at the present time. I cannot really say how long I have paid $17, but it is not very long. It may be a year and it may be less. I cannot really say when it was raised.

Cross-examination—In answer to defendants' counsel:

I went in the apartment the day after election in November, 1896. The reduction by Mr. Muhlker of $1 in my rent was made two or three months after November, 1896, and that reduction continued until within the last year or so, or less.

I have lived on the top floor all the time I have been there. At

the time I went in there in November, 1896, the regular trains were running by this apartment house in the trench in the middle of the avenue, but there was a wooden temporary structure on the side right opposite.

42 Re-direct examination—In answer to plaintiff's counsel:

At the time this reduction in rent was made, I think the trains had started to run on the structure, but I am not positive on that point. That is my best recollection.

I never noticed if passengers in the trains can look into my windows, but I suppose they can.

Q. At the time the reduction in rent was made by Mr. Muhlker, as you have testified, state what, if anything, you said to him in reference to the structure and running of trains thereon.

Objected to by defendants' counsel as immaterial, irrelevant and incompetent.

Objection overruled. Exception to defendants.

A. Well, I said I did not think the flat was worth what I was paying for it, there was so much dust and noise.

It is stipulated that this action was commenced January 7th, 1897.

It is also stipulated that the New York Central and Hudson River Railroad Company is the lessee of the railroad and structure on Park avenue in front of these premises under a lease from the New York and Harlem Railroad Company, for a term of 401 years from the 1st day of April, 1873.

It is stipulated that under the auspices of the board for the Park Avenue improvement, work was begun on this improvement in or about April, 1893, under a contract made by the board for the Park Avenue improvement with John J. Hopper.

43 CHARLES M. MOODY, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

My business is that of life insurance. My office is at 149 Broadway. I was at one time a tenant in the premises on the northwest corner of Park avenue and 115th street. I occupied the third floor north. The apartments range north and south there. When I moved in there there was not an elevated structure in front of the premises, and in the fall of 1896, when we moved out, they had just got to moving the construction trains on top of the structure.

When I first went there I think I paid $22 per month rent. That was in 1891. When I moved out I paid $16. When I moved out I said something to Mr. Muhlker in reference to the presence of the railroad structure in front of my apartments.

Q. State what you said to Mr. Muhlker.

Objected to as immaterial, irrelevant and incompetent.
Objection overruled. Exception to defendants.

A. I said to Mr. Muhlker that the noise would be very great in future—it had been very bad in the past with the old structure, but the noise had increased to such an extent that it would be impossible to live there with any degree of comfort, and, although the price of the rents was perfectly satisfactory, my wife would not submit to staying there, and so I told Mr. Muhlker that I would move out, and that was the reason I moved.

44 JOHN B. GERETY, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I am in the plumbing business. I am a tenant in the premises on the northwest corner of Park avenue and 115th street, and Mr. Muhlker is my landlord. I occupy the small northerly store in the premises, and pay $18.00 a month rent.

I have noticed very plainly the elevated structure in front of my store, and the physical effect of the operation of trains upon it.

Q. State what you have noticed?

A. In the first place, the noise is something so that you cannot stand it hardly. You cannot hear a word said in my place when a train is going by and for sometime before it reaches there, and if you are talking to anybody you have got to stop and wait until the train goes by. In the afternoon from about four or half-past they seem to run quite a number of trains, and then you cannot have any conversation in my place at all with anybody. The dust and dirt is something fierce from it at times. The structure does not take off so much light as the trains passing by. If you are writing at the desk, and a train passes, it will shade the light right off you.

I was familiar with the conditions before the elevation of the structure. Then they were run in the cut down below. At that time I did not occupy the store on Park avenue; I was about sixty feet off Park avenue then, on 116th street.

Cross-examination—In answer to defendants' counsel:

I have been in that store where I am now about six months. I did not pay $18.00 all that time. I have paid $18.00 about
45 three months. The rest of the time I paid $15.00. When I first went in there Mr. Muhlker wanted $18.00, but he agreed to give it to me for a few months for $15.00, until I saw whether I could stay there or not, and then the rent was raised to $18.00, and now I am paying $18.00—under protest, though.

Park avenue is opened and paved all the way across in front of my store. We get smoke from this structure now; a day like to-day quite a lot of smoke from it, as I noticed this morning. On a clear

day I do not notice it so much. I cannot say that I do not notice it at all. Sometimes we do, and sometimes we do not; but it is not so noticeable as on a heavy day. To-day is a damp day.

THEODORE F. SANDER, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I live at 97 East 116th street. I have made measurements of the elevated structure in front of the premises in suit on the northwest corner of 115th street and Park avenue, and I have those measurements with me.

The present structure is made of steel and iron girders. The road-bed is solid; and is supported by steel columns which are embedded in the soil of the avenue. At the base of the columns there are blocks to protect the columns—wagon guards. Two girders run alongside of this structure, which are solid. The structure opposite the premises in suit was completed about September, 1895. My recollection is tracks were laid upon the structure in March, 1896. Construction trains were first run on the structure some time after the laying of the tracks; I believe it was in March. The grade of the present railroad in front of these premises rises from
46 110th to 116th street. The road-bed at this point was filled with rock ballast in September, 1899. There are six columns supporting this iron structure in front of plaintiff's house, and the distance of the columns from the house is 40 feet and 7 inches. The width of the structure from out to out of the columns is 59 feet. About 18 inches of the road-bed extends outside of those columns. The width of the sidewalk in front of the plaintiff's premises is 14 feet 7 inches.

Q. What is the width of the sidewalk on the east side?

Objected to by defendants' counsel as immaterial, irrelevant and incompetent.

Objection overruled. Exception to defendant.

A. 14 feet 7 inches. The distance between the curb lines in front of plaintiff's premises is 110 feet and 10 inches. The width of Park avenue between house lines is 140 feet.

Q. What is the width of Madison avenue at this point?

Same objection, ruling and exception.

A. 90 feet.

Q. And Lexington avenue at this point?

Same objection, ruling and exception.

A. 85 feet. I made these measurements personally. I have the dimensions of the columns supporting the present viaduct; they are 1 foot and 4 inches by 1 foot and 8 inches.

There are four tracks in front of these premises.

The dimensions of the wagon guards at the base of the iron columns are 3 feet by 3 feet. The width of the cars operated over this structure is 10 feet 4 inches. I have measured some of those cars. The length of the ties is 8 feet, and the gauge of the tracks is 4 feet 8½ inches. The height of the road-bed above the sur-
47 face of the avenue at the south side of the premises in question is 33 feet 3 inches at the top. The height of the road-bed above the surface of the avenue at the north line of these premises is 27 feet and 10 inches. A part of the structure, the handrails, is above the road-bed. Their height is 3 feet and 6 inches, and the total height of the handrails above the surface of the avenue is 36 feet and 5 inches. The height of the girders running along the side of the structure is 7 feet and 4 inches. There is also a girder along the centre of the same height.

I remember the railway as it existed in front of these premises prior to the elevation of the tracks. It consisted of four tracks and ran between the masonry walls about three and one-half feet high on each side of the avenue. The elevation of the tracks above the surface of the avenue on the south line of these premises was about 2 or 2½ feet. It struck the surface of the avenue with reference to these premises right at the north line of the premises. Along the northerly part of the premises it went into a kind of cut or tunnel that they had there; it started in right between 115th and 116th streets.

Q. Do you know if the present structure is in the line of the old structure?

A. Yes, sir. The wagon guard stands outside of the pillar. From out to out of the wagon guards it is wider than from out to out of the old parapet walls that were alongside of the old structure, so that the extreme width of the present structure is greater than that of the old structure.

Cross-examination—In answer to defendants' counsel:

I never measured the old structure. I measured the new struc-
ture last September. I do not know the width of the old
48 structure, but I know the width of the present structure. From outside to outside of the wagon guards it is 59 feet wide. That is from column to column I measured. I did not measure the column protectors on the bottom. I measured them separately, and they measured 3 feet by 3 feet, and I believe it is 18 inches that extends outside of the columns on each side. The dimensions of each of those columns at the bottom are 3 feet by 3 feet. I say the new structure is wider than the structure built under the laws of 1872, and my foundation for that statement is that while they were erecting that structure, they took the side wall off, and when they put in the columns, they put in the columns even with the side of the masonry wall, and after that, after the columns were in, they put in the column protectors. I did not measure that at

that time, but I saw them put it in. That was done in about 1894. They started it in 1893, and this must be some time afterwards while the structure was going on. I lived on the avenue and I used to go down and watch them; I kept no dates. I had no interest in watching them work, I was in the building business at that time, and naturally enough the work took my attention there. I have not measured cars on the structure there, but have measured them at 116th street, in the yard. I have measured passenger cars and Pullman cars. I measured just one car. The first car I could get to, and that was a palace car, and that is all the cars I measured. I only go by the measurement of that one car, that is all I can testify to. I did not measure the height or length of it, just the width.

The sidewalks are the same width on each side of Park avenue, 14 feet and 7 inches. There are six columns in front of these premises, I mean two rows across the street of three each. There are three columns from east to west for each girder. There are six all the way across. There are only two rows in front of the house, three from south to north and three in each row from east to west. The southern row of columns is located with reference to the southern line of this property about 25 feet north of the southern line of this property, and the other is located just on the northern end of this property.

I am familiar with the avenue as it was when the old structure was there; I lived there since 1888. I could not get across the avenue at 115th or 114th streets. I could get across at 116th street. There was a wagon bridge across 116th street which ran up above the grade of the street. Now the avenue is all open and paved the full width, 110 feet and 10 inches from curb to curb, and a wagon can drive from one side to the other, and you can drive through 115th street without going up to 116th street, and that has been so ever since the work was finished on the structure.

In the total height of the structure I included the height of the girder that was on it.

Plaintiff's counsel offered in evidence from the register's office, a deed from Benjamin L. Benson, to the mayor, aldermen and commonalty of the city of New York, dated November 19, 1825, recorded December 6, 1825, in Liber 196 of Conveyances, page 261:

Conveys the fee of certain strips of land laid out as streets on the map of the city of New York, and among them the fee of Park avenue, of the width of 100 feet, commencing at the centre line of the "old road to Harlem" and extending southerly for several hundred feet, the land conveyed being more particularly described as all those tracts of land, belonging to the party of the first part "over which the First avenue, the Second avenue, the Fourth avenue, * * * 115th street, and 116th street, run, pass, or extend, as said avenues or streets are laid out by the commissioners of streets and roads in the city of New York under and by virtue of the act entitled 'An act relative to improvements touching the laying out of streets and roads in the city of New York, and for

other purposes,' passed April 3, 1807, * * * to have and to hold all and singular the said pieces or parcels of land, hereditaments, and appurtenances, and every part and parcel thereof, above, in and by these presents released and confirmed, unto the said parties of the second part and to their successors, to the only proper use and behoof of the said parties of the second part and their successors forever, in trust, nevertheless, that the same be appropriated and kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be."

DEFENDANT'S COUNSEL: I wish to object to the introduction of this deed upon the ground that no part of the property conveyed by it is in front of the premises in suit.

Objection overruled. Exception to defendants.

Deed received in evidence.

Plaintiff's counsel offered in evidence, from the comptroller's office, an original deed from Peter Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24, 1827, acknowledged July 24, 1827, and not recorded.

This deed conveys the fee of certain streets, and among them all that part of Fourth avenue extending northerly for several
51 hundred feet from the old road which leads from McGown's pass to Harlem, to the line of the land of S. Benson, deceased; all of which is more particularly described and laid down on a map made by J. F. Bridges, city surveyor, in September, 1826, of the lands formerly owned by Samson Benson and Benjamin Vredenburgh, deceased, and filed in the register's office of the city of New York, in trust that the same be left open as public streets for the use and benefit of the inhabitants of the said city forever.

DEFENDANT'S COUNSEL: I object to the introduction of this deed on the ground that it is an unrecorded instrument, and as immaterial, irrelevant and incompetent.

Objection overruled. Exception to defendants.

Deed received in evidence.

Plaintiff's counsel offered in evidence map No. 84, filed September 10, 1826, entitled "Map of property formerly belonging to S. Benson and B. Vredenburgh, deceased, in the twelfth ward of the city of New York." On this map Fourth avenue and the intersecting streets are represented as laid out in accordance with the map of the city of New York, as the latter was established under Laws of 1807, chapter 115. Fourth avenue is shown as of the width of 100 feet. The map represents lots laid off and numbered. Lot No. 489 is represented as at the northwest corner of Fourth avenue and 115th street. Lot No. 488 is just north of No. 489 and lot No. 487 is just north of No. 488. Each of the lots named has a frontage of 25 feet 2½ inches on Fourth avenue, and a depth of 110 feet. The "old road to
52 Harlem" is represented as running in a northeasterly direction, diagonally across Fourth avenue in front of the premises in suit.

Map received in evidence.

Plaintiff's counsel offered in evidence deed from Peter Poillon and Eliza, his wife, to Andrew V. Stout, dated June 31, 1827, recorded July 31, 1827, in Liber 220 of Conveyances, page 341.

Conveys "all those certain lots, pieces or parcels of land, situate, lying and being in the twelfth (late ninth) ward of the city of New York, and known and distinguished on a certain map made by J. F. Bridges, city surveyor, of lands formerly belonging to Samson Benson and Benjamin Vredenburgh, deceased, situate in the twelfth ward of the city of New York, which map bears date September, 1826, and is now on file in the office of the register of the city and county of New York, as lots numbered 488 and 489, bounded as follows, viz.: westerly by a line drawn parallel to the Fourth avenue on the westerly side thereof at the distance of 110 feet therefrom, northerly by a line drawn parallel to 115th street on the northerly side thereof at the distance of 50 feet 5 inches therefrom, southerly by 115th street, and southeasterly by the old road leading from Harlem to Kingsbridge, together with all and singular the rights, members, privileges, hereditaments and appurtenances whatsoever unto the said above mentioned and described premises in anywise appertaining or belonging. * * * And the said Peter Poillon, for himself, his heirs, executors, administrators, and assigns, doth covenant, grant, promise and agree to and with the said party of the second part,
53 his heirs and assigns * * * that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the hereditaments and appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons whomsoever. * * * And also that the said parties of the first part, and their heirs, and all and every other person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of, in, or to the hereinbefore granted premises, by, from, under, or in trust for him, her or them, shall and will at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do and execute, or cause or procure to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably devised, advised or required."

Deed received in evidence.

It is stipulated that by certain mesne conveyances the title to the aforesaid lots numbered 488 and 489 was vested in Emily A. Verity.

54 Plaintiff's counsel offered in evidence, from the register's office, the record of a deed from Emily A. Verity, widow, to

Henry Muhlker, dated June 6, 1887, recorded June 7, 1887, in Liber 2047 of Conveyances, at page 338, the expressed consideration being $20,400, and the conveyance being subject to a mortgage amounting to $12,000. This deed conveys:

All that certain piece or parcel of land situated in the city of New York and bounded and containing as follows, to wit: Beginning at the northwesterly corner of Fourth avenue and 115th street, running thence northerly along Fourth avenue 50 feet 5 inches, thence westerly and parallel with 115th street 90 feet, thence northerly and parallel with Fourth avenue 50 feet 5 inches to the centre line of the block, thence westerly and parallel with 115th street 50 feet, thence southerly and parallel with Fourth avenue 100 feet 11 inches to the northerly side of 115th street, and thence easterly along 115th street 140 feet to the place of beginning.

Received in evidence.

Plaintiff's counsel offered in evidence deed from Peter Poillon and Eliza, his wife, to Joseph Smith Perry, dated June 21, 1827, recorded November 28, 1827, in Liber 228 of Conveyances at page 123.

"Conveys all those certain lots, pieces or parcels of land situate, lying and being in the twelfth (late ninth) ward of the city of New York, and known and distinguished on a certain map made by J. F. Bridges, city surveyor, of lands formerly belonging to Samson Benson and Benjamin Vredenburgh, deceased, situate in the twelfth ward of the city of New York, which map bears date Septem-
55 ber, 1826, and is now on file in the office of the register of the city and county of New York, as lots numbered 484, 485, 486, 487, which lots are designated on said map as parcel No. 35, and are bounded as follows, viz: Easterly in front by the Fourth avenue, westerly by a line drawn parallel to the Fourth avenue on the westerly side thereof at the distance of 110 feet therefrom, northerly by a line drawn parallel to 116th street on the southerly side thereof, at the distance of 50 feet 5 inches therefrom, and southerly by a line drawn parallel to 115th street at the distance of 50 feet 5 inches therefrom on the northerly side thereof, * * * together with all and singular the rights, members, privileges, hereditaments and appurtenances whatsoever unto the said above mentioned and described premises in any wise appertaining or belonging. * * * And the said Peter Poillon for himself, his heirs, executors, administrators, and assigns doth covenant, grant, promise and agree to and with the said party of the second part, his heirs and assigns * * * that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises and every part and parcel thereof, with the hereditaments and appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons whomsoever. * * * And also that the said parties of the first part, and their heirs, and all and every other person or persons whomsoever, lawfully or equitably deriving any es-

tate, right, title or interest of, in, or to the hereinbefore granted
56 premises by, from, under or in trust for him, her, or them, shall and will, at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do and execute, or cause or procure to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, his heirs and assigns, forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably devised, advised or required."

Received in evidence.

It is stipulated that by certain mesne conveyances the title to the aforesaid lot numbered 487 was vested in one John B. Smith.

Plaintiff's counsel offered in evidence, from the register's office, the record of a deed from John B. Smith, and Bertha, his wife, to Henry Muhlker, dated June 22, 1888, recorded June 25, 1888, in Liber 2150 of Conveyances at page 134, the expressed consideration being $5,500, and the conveyance being made subject to a mortgage amounting to $4,000.

"This deed conveys all that certain lot of land, situate, lying and being in the city of New York and bounded and described as follows: Commencing at a point on the westerly side of Fourth avenue distant 50 feet and 5 inches northerly from the northwesterly corner of Fourth avenue and 115th street, running thence northerly along the westerly side of Fourth avenue 26 feet, thence westerly and
57 parallel with 115th street 90 feet, thence southerly and parallel with Fourth avenue 26 feet, thence easterly and parallel with 115th street 90 feet to the point or place of beginning, together with all the right, title and interest of the said parties of the first part of and to a strip of land 5 inches in width and 90 feet in depth adjoining the lot of land hereinbefore described on the northerly side thereof."

Received in evidence.

Plaintiff's counsel offered in evidence chapter 115 of the Laws of 1807; also chapter 86 of Revised Laws of 1813; also chapter 10 of the Laws of 1835; also chapter 55 of the Laws of 1837; also chapter 274 of the Laws of 1837; also chapter 339 of the Laws of 1892; also chapter 548 of the Laws of 1894.

The foregoing statutes are not printed in this case on appeal, but may be referred to and used by either party on any appeal herein, with the same force and effect as if so printed.

Plaintiff's counsel offered in evidence from the county clerk's office a petition verified April 15th, 1850, in proceedings entitled "In the matter of the application of the mayor, aldermen and commonalty of the city of New York, relative to the opining of Fourth avenue from 38th street to the northerly line or side of 135th street in the twelfth and eighteenth wards of said city;" the peti-

tion being verified April 15th, 1850, and having affidavits attached showing the publication and posting pursuant to law.

Received in evidence.

It is stipulated that this is offered simply to prove the widening of the avenue, being the proceedings taken to widen Park
58 avenue, from 100 feet to 140 feet, by adding 20 feet on each side.

Plaintiff's counsel offered in evidence rule for the appointment of commissioners of estimate and assessment in the same proceeding, appointing Samuel Jones, John M. Pinckney, and Richard J. Smith, commissioners; filed April 22, 1850. Also the oath of said commissioners, filed April 23, 1850.

Received in evidence.

Plaintiff's counsel offered in evidence order of the special term confirming the report of the commissioners in this proceeding; filed November 15, 1853.

Received in evidence.

HENRY MUHLKER, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I am the plaintiff in this action, and the owner of the premises on the northwest corner of 115th street and Park avenue, in this city. I purchased the vacant lots there. The considerations named in the deeds are correct. I have to add to those considerations the amount of mortgages to which the property was subject in order to get the value paid by me for the lots. I subsequently, in 1891, constructed houses on the lots. They were ready for occupancy about the first of the year 1892. I am a builder and have been in the building business for about 42 years. These houses were built under my instructions, and I paid for them. It cost me $27,000 to construct the corner house, which was the reasonable worth at that time. I have collected the rents from these premises con-
59 tinuously since the time that they were built up to the present time. The house on the corner is five stories and basement; with three stores underneath on Park avenue. The entrance to the apartments is on Park avenue, in the middle of the block. Above the ground floor the house is used for flats, which range north and south. In the north apartment there are five rooms and a bath, and in the south there are seven rooms and a bath. They have all improvements. In 1892 I received for the corner store $100 per month rent, and for the next store $28.00, and the next store $25.00. At the present time I receive $60.00 for the corner store, but I had to let it for $50.00 for some years before I got $60.00. For the store next to the corner I get $18.00. And for the store north of that, $18.00. For the second floor above the store, one flight up, south, seven rooms, I received $30.00 rent in 1892, and for the north I got $24.00. For the third floor, south, I received $1.00 less than I did for

the apartments under it, and that difference continued all the way up until you got to the top. The same rule applies to the north; I received $1.00 less for each apartment as you went up. At the present time for the second floor, south—half of the time it is empty—and I do not receive anything; but now I let it two months for nothing and I get $20, so it makes it up to about $15.00; I don't know exactly. For the north apartment, on the floor above the store, I receive $18.00 at the present time, and for the third apartment, on the south, I receive $19.00 at the present time, and on the north, $16.50. I receive no rent at the present time for the fourth apartment, south. It is empty. The schedule price is $18. I receive for the north apartment on that floor $16, and for the top floor, south, $17, and for the north $15. The rents which I collected in 1892 continued until about 1895.

60 I remember what the conditions were before the present structure was put up in front of my premises.

Under the old conditions they commenced to run trains on four tracks in front of my premises about 1878.

The old structure run down and under 116th street and in the tunnel, and 116th street had a bridge over it in those days, and the railroad ran underneath. The present structure is all an iron structure—big heavy iron—and it takes the light away.

I have observed as to the noise that you cannot hear your own words; sometimes we cannot talk to anybody there. You have got to go off in the street if you want to talk to anybody. I have certainly observed the vibration of my building from the operation of the trains. I did not notice any vibration when the trains were operated under the old conditions, and there was not so much noise then. I have observed cinders and smoke and steam from the operation of trains on the present structure. I have been upstairs, and I have a sample of the cinders here. I picked it up on the roof. I have to sweep the roof twice a week.

(Witness produced an envelope of cinders.)

I picked these cinders up personally from the roof of my house on September 27, 1900.

Plaintiff's counsel offered in evidence the envelope of cinders.

Objected to by defendant's counsel as immaterial, irrelevant and incompetent, and on the ground that there is no proof in the case that they were thrown there by the defendants' trains.

Objection overruled. Exception to defendants.

Received and marked Plaintiff's Exhibit A.

61 I own the houses adjoining on 116th street. They were constructed at the same time.

Cross-examination—In answer to defendants' counsel:

I heard Mr. Gerety testify here to-day that the structure did not interfere with the light in his store.

Q. Is it true what he said?

A. Yes, sir. The structure certainly interferes with light in my apartment house.

Q. Then Gerety did not tell the truth, did he?

A. Well, I heard something what he said about the light. I did not take any particular notice of what he said there.

I do not live in this house. I live at 18 West 114th street. It cost to build this house $27,000. I am my own agent and collect my own rents and set my own prices for the premises for rent. In 1892 I got $100 per month for the corner store. The tenant at that time was J. B. Fitzpatrick. He had a liquor store, and was there until 1893. While he was there he paid me $1,200 per year.

Q. That is what he was to pay, isn't it; how much did he actually pay you?

A. He paid me that.

Q. Isn't it a fact, now, that in 1892 you made a lease to Alex. Hinchey of that store at a rent of $1,000 a year?

A. The first year, but there was an additional—I guess Hinchey was there over a year, and he paid me while he was there.

Q. Isn't it a fact that on the 1st of August, 1892, you made a lease of that same store to Neal Kennedy for a saloon at the same rent, $1,000 per year?

A. Neal Kennedy bought out the first man, and I think he got a new lease.

Hinchey paid me as long as he was there, until he sold out to another man. I think Hinchey was there two months. The
62 lease will show that. From 1893 to 1895 my store was empty a little while. I am willing to swear that it was not empty two years. I do not remember who was there in 1895, but the lease was drawn up to somebody there. A man named Mitchell was there in 1895. He did not pay me so much a month as that, but he paid me rent. He bought it out from another man there. There was a drygoods store there in 1896 for four or five months, and they paid me $50 per month rent. After that there was a drug store in 1897, but he was not there long. He moved and sold out the things to another man. My store was not vacant for six months after he moved out, but he sold to another man. I cannot remember the name of the man who is there now. He pays $60 per month and paid the same last year. The year before he paid $50. He went in there at $50. He had it two years for $50, and $60 the next year, and that was the last year.

The third floor north in 1891 rented for $20, I think; that is next to the top.

Q. You testified $23 here?

A. $23 was underneath. The first floor, you understand, is a store, and one flight up—that is the difference there in the corner house; we haven't no first floor there; it is the second, third, fourth and fifth. I testified that in 1892 the rent for the third floor north was $23.

I remember Mr. Moody who was there in 1891, and he paid me $22 until 1895, I guess. The second floor south now brings me $20

per month, and that has been the price for that flat for a long time—for the last two years. That rent was until 1896. In 1897 and 1898 the rent for the second floor south was $18 and $20. In 1898 the rent was less than it was in 1897. In 1897 I rented the second floor south for $25. Then they moved out and they got it
63 less. Then it went down to $18. This was the first of August, 1898, E. Boyle, $18. That is the only entry there is here in my memorandum book. There is nothing here about 1897.

I have here in my memorandum book that the second flat north rented from 1892 to 1895, for $22. In 1897 I got $18 for this same flat.

(Witness withdrawn at the suggestion of plaintiff's counsel for the purpose of figuring out the rents for 1897.)

I have found out from my books that the rent of the second floor north, in 1897, was $18, and the third floor south was $19, and the third floor north $16.50; the fourth floor south $18; the fourth floor north $16; the fifth floor south $17, and the fifth floor north $15. The second floor south brought $30 in 1895, and that continued on, I think, between 1895 and 1896. I ask $18 for the fourth floor south to-day.

The mortgages that were on my property when I bought it are still there. The mortgage is $60,000, and is on the whole of the property—the three houses. It was given in 1892, at the time I had the building ready, but it has been changed since. The Greenwood cemetery owns it now. That is the only mortgage on the property, and it is a blanket mortgage covering all three of the houses.

Q. It does not separate?

A. Oh, yes, it is separated.

Q. Then what is the mortgage on this property on the corner; 26 feet on 115th street and 76 feet 5 inches on Park avenue?

A. $25,000.

JOHN H. WHITTLE, called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I am a real estate broker and appraiser, and my office is at
64 the southwest corner of 116th street and Park avenue, adjacent to the premises in suit. I have been in the real estate business about 17 years, and during that time I have bought, sold and appraised property in this vicinity. The principal field of my operations has been north of 90th street and east of Fifth avenue. During that time I have bought, sold, rented, leased and taken charge of property in the vicinity of the premises in suit, appraised property and made loans on them.

Q. How many appartments at the present time have you in your care or charge in this vicinity?

A. I have directly adjoining the property in question an apartment house containing 37 apartments and seven stores; corner of 118th street and Park avenue I have a house containing 13 apartments and one store; I had in 115th street, 25 feet east of Park avenue, two houses, 25 feet west of Park avenue two houses containing 20 apartments, I have four houses on the northwest corner of 112th street and Park avenue, I have a number of others further away.

I was familiar with the physical conditions of the railroad in front of this property prior to the elevation of the tracks of the defendant company.

Q. Will you describe those conditions?

A. The street was the same width as it is now, and the railroad at this point—that is, opposite the southerly line of this property, ran at or about the surface of the ground. From the southerly line of this property to the northerly line it gradually and rapidly went into a cut. When the trains reached the northerly line of this property in question, they were about one-half obscured from the sight of a person on the sidewalk. I remember when they commenced running on the original four tracks there, and to the best of my recollection it must have been in 1877 or 1878. I observed
65 the physical effect of the operation of trains under the old conditions upon the property on Park avenue. At this point the trains were at or about the level of the ground, and partly covered up as they proceeded northerly. There were some cinders, smoke, &c., thrown and cast upon the property, the sidewalks and probably more or less upon the first story. There was little or no obstruction to the light. There was little or no vibration. The apartments above the grade were of but very little less value than those situated on parallel avenues.

I have observed the operation of trains on the present structure and the physical effects of that operation upon the neighboring property. The trains run above the level of the fourth story of this property and the structure and the trains passing the property obscure the light. The steam emitted by the trains produces flashes of light in the apartments. The smoke and cinders are cast upon all the floors and in the windows of all the apartments in the building. I have observed these drippings at both of the streets at each end of the premises. At 116th street and at 115th street I have observed it very frequently, and in some cases to my own personal sorrow, as it destroyed my own clothing. The vibration is very much increased. There is considerable increase in the noise. The trains running opposite the upper portion of the buildings, the noise has been increased considerably and the structure gives more or less noise.

Since the elevation of the tracks the privacy of the rooms opening on Park avenue has been entirely destroyed unless you close the window and cover it up with a heavy shutter. Before the elevation of the tracks it was not injured in any way, as it was impos-

sible to see into the windows of the apartments from the trains
66 to any more extent than you would from the sidewalk on the opposite side of the street.

In 1892 Park avenue in this vicinity was very well built up. At the present time there is little or no change, but very few buildings have been erected on Park avenue from 110th street to 125th street since 1892. I believe one or two buildings have been destroyed or taken down.

Madison avenue in 1892, from 110th to 116th street, was well built up, and from 116th street to 120th street it was very sparsely built upon, and from 120th to 125th street it was fairly well built upon. Without examining it specially for this purpose, I should say that Madison avenue at the present time, as compared with 1892, every lot is built upon from 110th street to 125th street. There have been a great many houses constructed since 1892—all there possibly can be—to the best of my recollection.

Lexington avenue in 1892, from 112th street to 125th street, was fairly well built up. There have been comparatively quite a large number of buildings built upon it since 1892. There is no elevated railroad on either Lexington or Madison avenue. The grade of the defendants' railroad in front of these premises ascends, going north. Trains going north do considerable puffing as they go up the grade until they reach 116th street and trains coming south do puffing until they reach 116th street.

I have observed the volume of business and traffic on Park avenue, both in 1892 and at the present time. There is considerably less traffic on Park avenue at the present time than there was in 1892, in this vicinity.

From my own observation there has been an increase of vacancies as compared with those before the elevation of the tracks.

I have examined the premises in suit for the purpose of
67 appraising them. It is a five-story and cellar brick building, with stone trimmings. The grade floor is occupied by three stores. The upper floors are laid out in apartments, two on each floor; the northerly ones consist of five rooms and bath; the southerly one consists of six rooms, a store room and a bath room; making 8 rooms in all. Each apartment is equipped with what are known as all improvements. That does not include steam heat or hot water supply, but hot water is made by each individual tenant. The building is very well constructed; the wood work of the main portions being hard wood, and the rest cabinet trim. Altogether it is a building that is superior to the usual run of apartment houses of this description. The dimensions of the lot are 26 x 76.10. I think that is 94 per cent. of a full lot, according to the Murray-Hoffman rule. A full lot is 25 feet front by 100 feet in depth. That is the standard of real estate values and is so recognized by real estate men in this city.

In my opinion the value of the premises in suit in 1892 was $45,000, $15,000 for the lot and $30,000 for the building; in 1888 the lot was worth $12,250; in 1893 the premises were worth $43,750,

the lot $14,250 and the building $29,500; in 1894 the premises were worth $42,750, the lot $13,750 and the building $29,000; in 1895 they were worth $39,000; lot $12,000 and building $27,000; in 1896 they were worth $37,750, lot $11,750, building $26,000; in 1897, $33,000, $10,000 for the lot and $23,000 for the building; in 1898 they were worth $32,000, lot $9,575, building $22,425; in 1899 $31,000, lot $9,300, building $21,700; in 1900, $30,000, lot $9,000, building $21,000.

There is a ratio between fee and rental values recognized by real estate dealers for different classes of property. The ratio be-
68 tween the fee and rental values for this class of property is about 9 per cent. That ratio has prevailed since 1892 to the present time.

In my opinion the rental value of the property in suit for each year from 1892 to the present time is as follows: 1892, $4,000; 1893, $3,925; 1894, $3,835; 1895, $3,500; 1896, $3,400; 1897, $2,975; 1898, $2,875; 1899, $2,775; 1900, $2,700.

I am familiar with the course of fee and rental values on Lexington and Madison avenues since 1892.

Q. What has been the course of fee values on Lexington avenue since 1892 in this vicinity?

Objected to as immaterial, irrelevant and incompetent and as not furnishing a proper basis for comparison.

Objection overruled. Exception to defendants.

A. Upwards; 25 to 30 per cent. Almost the same applies to Madison avenue; 30 per cent. applying to Madison and 25 per cent. to Lexington avenue, about.

Q. What has been the course of rental values on those avenues during the same period?

Same objection, ruling and exception.

A. Upwards; 5 per cent. to 10 per cent.

Q. What in your opinion is the value of a full corner lot on Lexington avenue in this vicinity at the present time?

Same objection, ruling and exception.

A. This vicinity would be very changed. At 115th street, my opinion is, about $27,000. 116th street would be a great deal more money.

Q. Take Madison avenue, in a location corresponding to that of the plaintiff; what is the value of a full corner lot?

Same objection, ruling and exception.

A. About $28,000 to $29,000.

69 For similar apartments in the same neighborhood competition tends to reduce to a uniform value, everything else being equal. There are apartments similar to the plaintiff's in this vicinity off the line of the railroad. In some cases I know of the rental value of those apartments at the present time.

Q. How does the rental value of the plaintiff's apartments compare with the rental value of similar apartments off the line of the railroad, in this vicinity?

Objected to as immaterial, irrelevant and incompetent.
Objection overruled. Exception to defendants.

A. Similar apartments in this vicinity off the line of the railroad will bring about 25 per cent. rent more than the plaintiff's apartments do.

Q. Would that difference obtain since 1897?

Same objection, ruling and exception.

A. Yes, sir; by a decreased value of the same apartment, the rental value of the plaintiff's apartments to a great extent by decrease and by a slight increase.

The elevation of the defendants' railroad tracks on Park avenue did not add any new transportation facilities in this neighborhood. There is a station at 110th street at the south and at 125th street at the north, and they were there before the elevation of the tracks, and trains were stopped at those stations.

I think the plaintiff originally purchased 50 feet and 5 inches on the corner of Park avenue and 115th street, the northwest corner; 50 feet and 5 inches on Park avenue, and 93 feet on 115th street; and then two other lots 50 feet front by 100 feet and 10 inches deep on 115th street, forming an L on the westerly end of the corner lot.

Then he bought 26 feet 5 inches, I believe, on Park avenue,
70 running westerly 90 feet, being an inside lot on Park avenue.

I have calculated how many full lots there were in that tract fronting on 115th street.

Q. How many?

Objected to as immaterial, irrelevant and incompetent.
Objection overruled. Exception to defendants.

A. There were four and a half to five lots on 115th street and 94 per cent. of a corner lot on Park avenue.

The course of fee and rental values I have given for the premises in suit represents the average course of fee and rental values of property on Park avenue in this vicinity.

Cross-examination—In answer to defendants' counsel:

I mean that property on Park avenue has depreciated at the present time. I do not think it can depreciate very much longer, because it will get so low there will be other uses for the property and then it will remain at that figure.

I know nothing about the number of trains that stop at 110 and 125th Streets stations. I should judge that about 25 per cent. more trains stop at 125th street at the present time than before the elevation of the tracks. These are mostly through trains, though; the

increase is mostly in the through trains. Formerly it was mostly local trains that stopped there. Now, I think, with very few exceptions, most of the fast trains stop there. I do not believe there is a fast train stops at 110th street.

Q. Will you name a similar apartment in the vicinity of this property in suit that brings 25 per cent. more rent than this property?

71 A. Yes; two doors west of this corner, $27 for the same number of rooms that the plaintiff gets $20 for. I should say the number of that house is 75 or 77 East 115th street. I do not know the exact number. It is exactly the same kind of a house, built at the same time, of the same material, and the same owner.

Q. Name one that the same owner does not own that brings 25 per cent. more rent in this vicinity?

A. On the northeast corner of Lexington avenue and 115th street the apartments bring 25 per cent. more than these do; the north half brings 25 per cent. more rent than this one does at the present time; in other words, you can get $25 there for the same number of rooms that you can get $20 for in this one. That house was built about 1890, with about the same kind of improvements. Since that house was built the surface road has gone through there and it has access to it.

In my opinion the corner lot on 115th street and Madison avenue is worth at the present time $28,000. There are four lots on that corner. All of them face 25 feet on Madison avenue. That is my opinion, and it is based on sales previously made in this vicinity, and what the property would sell for in my estimation, if put upon the market, and sales made of late day in streets adjacent to this one two or three blocks away.

Q. Name a lot sold in this vicinity that would indicate that this property is worth $29,000?

A. The southwest corner of 118th street and Madison avenue. I am looking at a memorandum that I have made of various sales, and I could not testify to all the sales in our neighborhood without the memorandum. I want to look at it to refresh my memory.

The southwest corner of 118th street and Madison avenue,
72 33 by 100 feet, five-story brick, sold in May for $70,000. That building was built in 1897. I do not know whether cash was paid for that property, but that was the price; I think there was some trade in it. Then, on the corner of 116th street and Madison avenue in December, 1899, the building, 50 feet by 100 feet, sold for $144,000. That building has previously sold as low as $90,000. My first memorandum of that building is in 1892, when it sold for $101,000. That was a foreclosure sale. The next sale was in 1892, when it sold for $112,000. It was sold by the man who bought it, and it was a regular sale. Then it was afterwards sold in that same year, foreclosed, for $110,500. Then, in 1899, it was sold as high as $144,000.

116th street is a different street from 115th street. That is the principal business street in that vicinity. It is 100 feet wide and

115th street is 60 feet wide. 116th street is and always has been open; that is you could go across from one side of the avenue to the other there at any place, but you never could on 115th street until, probably, about three years ago.

I should judge the size of the property at the northeast corner of 125th street and Park avenue is 100 feet by 100 feet. It may be 90 by 100 feet. I have to depend upon maps and memorandum for these things.

In most all cases the lots on Park avenue are all less than full lots, on account of the widening of the street, unless they have been altered or changed. I do not know off hand what that property brought when it was sold last. I think it was sold last probably from one member of the family to the other. I have forgotten at the present moment when it was sold before the new building was put up there. I do not know that the price paid for that
73 lot was $200,000. I would not be surprised if it was in that neighborhood. Assuming that it was, that would not shake my belief that property on Park avenue has been depreciating. The value of the 125th Street front is what gave that lot its value. They only used the Park Avenue front as an entrance for teams. It is 100 feet on Park avenue, but they have to have some depth, otherwise the rooms would be no good. Since that lot was bought there has been a building put up there. It is a 12-story brick building with marble trimmings. There have been other buildings in Park avenue in the last three years, and I can remember all of them. Three houses on the west side between 116th and 117th street-; this building, and that is all between 110th and 125th streets. Prior to 1897 Park avenue was not all built up up to 125th street excepting two lots. There are more lots than that vacant on it now. There was one block completely vacant, but that is the rocky bluff. I think on the east side of Park avenue between 117th and 118th streets there is one, 100 feet, and I could pick out considerably more, I think.

Q. That is all there is, isn't it; north of 125th street Park avenue has improved a great deal.

A. There has been considerable building up there; yes, sir.

The size of this lot is 76 feet 10 inches x 26 feet; 26 feet on 115th street and 76 feet 10 inches on Park avenue. It is a corner lot. The Hoffman rule does not always apply to corner lots; still, as to the areas compared with the valuation, I think it is comparatively the best rule that we have. It does not always apply as well to corner lots as to inside lots; that is to say, you cannot accurately figure on the percentage of the size of a corner lot as well as
74 you can on the percentage of the size of an inside lot by the Murray Hoffman rule.

The kind of street that property is on has a bearing on its value—whether it is a business street or not. Property on 116th street would be more valuable than property on 114th street, because 116th street is an artery, but the dimensions of the property, the area of the property, would not have any particular effect. Assuming two

lots of the same size, one on the corner of 116th street and one on the corner of 114th street, the one on 116th street would be of greater value.

I said that in 1892 the value of this property was $45,000, allowing $15,000 for the lot. I based the valuation of that lot upon the sales made at that time, of which I have a complete record, and my knowledge of business, being in business at that time in that vicinity, and making sales and rentals and leases and mortgages—general information and knowledge that I have as a broker and appraiser in that vicinity.

Q. What special sales did you have in mind; can you name one?

A. I have not equipped myself with the data in regard to the sales that I consulted and referred to. There were a few in that vicinity that I based it upon. I remember a sale in 1892 of a vacant lot on the southwest corner of 114th street and Park avenue. I think that was more than a full lot. I could not remember that the price paid was $11,000 without referring to date. It was sold on the exchange. That was one of the pieces of property that I took into consideration in valuing this; I took all corners in that vicinity that had been sold since 1892. I know that there was a sale in 1891 of the southeast corner of 116th street and Park avenue of a lot 25 feet x 100 feet. If I remember right, I think the price paid
75 was $16,000. That was a full corner lot. There was some difference there between a lot on 116th street and a lot on the corner of 115th street. I took that lot into consideration in calculating my value for which this property could be sold. I took the sales of both lots, also a lot in 113th street, southwest corner. I do not remember the particulars, but I know there was a sale at that time that I took into consideration.

Q. You have the value of this building running from $30,000 in 1892 down to $21,000 in 1900. Does that represent the natural deterioration of the building?

A. It does not.

Q. What are the elements that enter into the depreciation you have testified to?

A. Depreciation of the rental value to a great extent; a salable value—that is, the fee value, and what I could sell it for, what I could rent it for, and the general adaptability of the house for the particular neighborhood. I have not seen a schedule of rents for these premises. I heard the owner testify that it cost to build, in 1891, $27,000. That does not change my belief of my estimate of the value in 1892—it confirms it. I do not think it was worth more in 1892 than it was when it was built, but there is a difference between the cost of building a house and the value of it, otherwise nobody would build. There is a reasonable profit for the use of the money, time and the ability of the builder. In 1897 I said the lot was worth $10,000. The cause of the depreciation between 1892 and 1897 of $5,000 was, in my opinion, the elevation of the railroad in front of these premises. I have testified that at the pres-

ent date that lot is worth $9,000, and I attribute the depreciation to the same cause. There has been a constant depreciation, but the rate per year has varied.

Q. Take 1898. You have a valuation of $9,725 of this lot. What did you base your valuation on in that year?

76 A. That a full corner lot was worth $10,200 at that time. The trains were operated then in front of the premises and I observed the fact that the premises were not as rentable as they were before; that the rents they did get for them were not as high; and that some other information which comes to me as a broker, which probably I would not be allowed to testify to, as to offers and so forth, I figured out that that was a very fair valuation of a full lot on that avenue; and then I took a percentage of that full lot.

Q. You based that simply on those elements; not on any sales or anything of that sort?

A. The sales were very few.

In 1892 I testified that the rents of that property were $4,000 per year.

Q. Will you take up the houses in detail and give us what the rents were then; take the corner store first?

A. The corner store in my opinion was worth $100 per month, and the other stores were worth $28 and $25; the second floor south, 7 rooms and bath, $30; north, $24; the next floor south, $28; north, $22; the next floor, $26; $20; the next floor, 24; and about $19. Then of course my rental valuation is not a schedule rental. I allow a reasonable amount of variation of rents, and that would amount to more than $4,000.

It was an established fact that you could not get across Park avenue at 115th street, and we were of the opinion that when we could get across it might improve the accessibility and the value of the property in that vicinity; but our experience has been otherwise. You can get across Park avenue now at any part of it, but naturally people only cross at the street, and 116th street is almost one-third of the way from where the entrance is, and the natural inclination of a person going to that property is to go to 116th street and

77 cross the avenue there. Before this viaduct was built there were really two streets, one on each side of the old structure.

I know the southwest corner of Madison avenue and 116th street, 25 x 75 feet, five-story brick and *and* stone building. To the best of my recollection the buildings were not finished in 1894, and were sold at foreclosure. I could not tell off-hand what the price was without consulting my records. I do not know what condition the building was in when it was sold but it was not completed.

Q. You did not take that into consideration in forming your value of Madison Avenue property?

A. I noted the sale and took advantage of the sale, but I was not acquainted exactly with how much of the building was finished; therefore I could not take it entirely into consideration, though I knew it was an unfinished building at that time.

The southeast corner of 115th street and Madison avenue was a

lot 25 x 75 feet, with a five-story brick and stone building on it—a completed building. I don't believe that such a sale occurred, because I am not familiar with it, and I think there are a great many people in New York who would have paid a great deal more for the property than that.

Q. Won't you take the rents of to-day, that you said amounted to $2,700, and tell us in detail what they are; taking the store first?

A. In my opinion the corner store is worth what he gets for it, $60. The other two stores are worth $16 each. The second floor north is worth $17; the second floor south, $20. The third floor north, $16.50; south, $19. The fourth floor north, $16; south, $18. The top floor, $15; south, $17, when rented.

78 It would surprise me to learn that the actual rents received from that property are over $3,000 a year to-day.

Q. In 1897 you testified that the value of the rents was $2,975. Won't you in detail give what they were; taking the store first?

A. In 1897 the rents were about 25 per cent. less than they were in 1892, from my figures; in other words if a flat brought $24 in 1892, it brought $18 in 1897.

In my business knowledge a flat that brought $24 in 1892 would not bring more than $18 in 1897.

Re-direct examination—In answer to plaintiff's counsel:

I have this house for sale.

Plaintiff rests.

By DEFENDANTS' COUNSEL: I will reserve my motion to dismiss, if your honor please, until the conclusion of the case.

JOSEPH H. FRANKLIN, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to defendants' counsel:

I live at 14 East 125th street. I am manager of the Grand Central Depot and the Harlem line. I have been such manager since 1892. Before that time I was employed by the New York Central or New York and Harlem Railroad Companies as depot master of the Grand Central depot. I have been such depot master since 1871, and have been familiar with the tracks of the defendant between the Grand Central depot and Mott Haven. Prior to 1872 the tracks at 115th street were laid on the surface. There were two tracks. Then the tracks were sunken and there were four

79 tracks. At 115th street the tracks were pretty near the surface. Trains began running on the structure erected under the act of 1872 in 1874 or 1875, I won't be positive which. It was not in 1878.

I am familiar with the new viaduct structure running through Park avenue. There are four tracks upon that structure, two north-bound

and two south-bound. The north-bound tracks are on the west side and the south-bound on the east side. The outside tracks are used mostly for local trains and the inside tracks for through trains. There is a difference in weight between local and through trains, through trains being the heavier, and they run faster. The structure is ballasted with stone ballast, which was put in during the year 1899. I think we average nearly 500 trains a day now over that structure, counting an engine as a train, in both directions. There has been an increase in trains in the last few years; the through trains have increased more than the locals have for the last year.

Cross-examination—In answer to plaintiff's counsel:

What I call a local train over the line is a train that stops at 110th street and at Harlem and at Mott Haven. Some of the through trains stop there. Sometimes we use those outside tracks for express trains, and that has been done more frequently this summer than heretofore.

There is an up-grade from 110th street to 116th street past this property. Trains do more puffing to go up that grade than if there was a level track there. I am not positive that trains began to run on the four tracks in 1874 or 1875. I will swear that they began to run on the four tracks before 1877. It was either in the fall
80 of 1874 or the spring of 1875. I am speaking from my recollection and the recollections of other people—from what I have heard. I know the act requiring the railroad company to depress its tracks was passed in the spring of 1872, and a commission was thereafter organized under that act which prepared plans and specifications for the work. That act required a great deal of excavation of rock at various points north of 42d street to the Harlem river. I mean to say that they were able to do that work within three years from the spring of 1872. They commenced on that track, to the best of my recollection, probably the last of August or the first of September, and I am pretty positive that we ran over those four tracks in 1874.

Q. How late at night are trains operated over this structure?

A. 12.35 is the last train we have out until 4.35 in the morning. Between these hours trains are sometimes operated over the line. Some of those trains are quite heavy, and some of them are nothing but a light engine. There are only a very few trains between half-past 12 and 5 in the morning. Sometimes the trains we run to the shop have 16 or 18 cars. The maximum number of coaches attached to an engine on a regular train is about 15. The length of the cars will average about 65 feet, and the height about 14 feet 10 inches. The locomotive is the same height and same length as a car. These trains pass on that structure at the rate of 15 or 18 miles an hour. Some of the express trains will go as high as 20 or 23 miles an hour. Very few of them go up to 25 miles an hour. If I testified in the Sander case, tried before Mr. Justice Freedman last June, that they

sometimes go up to 25 miles an hour, I think it was true. I have lengthened out the time two minutes, and we do not run trains as fast now as we did a year ago. Most of the engines use hard
81 coal. Some of them use soft at the present time; but not over the Harlem line. I presume in the combustion of anthracite coal sulphuretted hydrogen is generated and emitted. I have noticed an odor from the burning of the coal.

Defendant's counsel offered in evidence chapter 115 of the Laws of 1807, which was also offered by the plaintiff.

Received in evidence.

Defendant's counsel offered in evidence a copy of a part of a map entitled "A map of the city of New York, by the commissioners appointed by the act of the legislature, passed April 3, 1807," and filed in 1811.

The map is marked Defendant's Exhibit 1. (Printed in appendix.)

Defendant's counsel offered in evidence chapter 263 of the Laws of 1831—Charter of the New York and Harlem Railroad Company.

Received in evidence.

Defendant's counsel offered in evidence copy of a map entitled "Profile and map of the Fourth avenue as surveyed for the contemplated Harlem railroad, New York, August, 1831."

Received in evidence and marked Defendant's Exhibit 2. (Printed in appendix.)

Defendant's counsel offered in evidence chapter 274 of the Laws of 1837; also chapter 702 of the Laws of 1872; also chapter 907 of the Acts of Congress of 1890, being the paragraph on page 37 of the acts of that year; also chapter 339 of the Laws of 1892; also chapter 548 of the Laws of 1894; also chapter 594 of the Laws of 1896; also chapter 613 of the Laws of 1898, which were received in evidence.

The foregoing statutes are not printed in this case on ap-
82 peal, but may be referred to and used by either party on any appeal herein with the same force and effect as if so printed.

Defendant's counsel offered in evidence a copy of a map entitled "Map of property required for the opening of Fourth avenue from 38th street to 135th street, New York, 1850;" being the map filed in pursuance of the proceedings called the damage map.

Received and marked Defendant's Exhibit 3. (Printed in appendix.)

Defendant's counsel offered in evidence a copy of a part of a map entitled "Plan and profile of work to be done in conformity with section 6 of the act to improve and regulate Fourth avenue, passed May 14th, 1872."

Received and marked Defendant's Exhibit 4. (Printed in appendix.)

Defendant's counsel offered in evidence articles of agreement, dated January 9th, 1832, between the mayor, aldermen and commonalty of the city of New York, and the New York and Harlem

Railroad Company, and embodying certain ordinances of the city of New York, dated December 16, 1831.

Received in evidence and the same is printed in the appendix to this case on appeal.

Defendant's counsel offered in evidence the original deed from Peter Poillon to the New York & Harlem Railroad Company, dated January 18, 1832, recorded in the office of the register of the city and county of New York, in Liber 338 of Conveyances, at page 515, on August 18, 1835:

PLAINTIFF'S COUNSEL: We desire to take a formal objection to this, as immaterial, irrelevant and incompetent, and on the further ground that it appears in evidence that the alleged grantor
83 in this deed had previously conveyed all his right, title and interest in and to the premises in suit, and also to the fee of Fourth avenue.

Objection overruled. Exception to plaintiff.

Received in evidence.

The same is in the words and figures following, to wit:

"This indenture, made this eighteenth day of January in the year of our Lord one thousand eight hundred and thirty-two between Peter Poillon of the twelfth ward of the city of New York, party of the first part, and the New York and Harlem Railroad Company, parties of the second part,

Witnesseth, that the said party of the first part, for and in consideration of one dollar, lawful money of the United States of America, to him in hand paid at or before the ensealing and delivery of these presents by the said parties of the second part, a receipt whereof is hereby acknowledged, and they, the said parties of the second part, and their successors from every part and parcel thereof, forever discharged by these presents, doth give, grant, bargain, sell and demise, unto the said parties of the second part, and their successors all that certain piece of land, situate, lying, and being in the twelfth ward of the city of New York, being part of one of the avenues laid out on the map of the city of New York, as the 4th avenue, and is included within a space of 24 feet wide running through the centre of said avenue, and between 115th street and 121st street, and is bounded and described as follows, viz.:

Northerly by land belonging to the estate of Samson Benson, dec'd; southerly by the old road leading from Harlem to
84 Harlem lane & McGown's pass; east and west by lines drawn parallel to the centre line of the 4 avenue on each side thereof at the distance of twelve feet therefrom.

To have and to hold the said premises and messuage above mentioned, with the appurtenances, unto the said parties of the second part, and their successors, from the day of the date hereof, for and during the full period of time, during which the said parties of the second part may remain an incorporated company, and on which they are to construct their railroad, and for no other purpose, with the power of sloping their embankments or excavations so much

farther beyond the lines of said premises hereinbefore granted, as may be necessary to support their work—not, however, extending beyond the width of the avenue.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

P. POILLON. [L. S.]

Signed, sealed and delivered in the presence of

ISAAC ADRIANCE.

CITY AND COUNTY OF NEW YORK, *ss:*

I certify that on this sixth day of February, 1832, personally appeared before me Peter Poillon, who is personally known to me to be the same person described in and who executed the within deed and acknowledged to me that he executed the same for the uses and purposes therein mentioned.

I allow it to be recorded.

ISAAC ADRIANCE,
Com'r of Deeds in the City of New York."

85 Defendants' counsel offered in evidence deed dated January 18, 1832, from Benjamin L. Benson, of the twelfth ward of the city of New York, party of the first part, to the New York and Harlem Railroad Company, party of the second part, and recorded in the office of the register of the city and county of New York, in Liber 338 of Conveyances, page 518, August 18, 1835.

Same objection, ruling and exception.

Received in evidence.

Same is in the words and figures following, to wit:

"This indenture, made this eighteenth day of January, in the year of our Lord one thousand eight hundred and thirty-two, between Benjamin L. Benson, of the twelfth ward of the city of New York, party of the first part, and the New York and Harlem Railroad Company, parties of the second part;

Witnesseth, that the said party of the first part, for and in consideration of one dollar, lawful money of the United States of America, to him in hand paid at or before the ensealing and delivery of these presents by the said parties of the second part, the receipt whereof is hereby acknowledged, and they, the said parties of the second part, and their successors from every part and parcel thereof, forever discharged by these presents, doth give, grant, bargain, sell and demise, unto the said parties of the second part, and their successors, all that certain piece of land situate, lying and being in the twelfth ward of the city of New York, being part of one of the avenues laid out on the map of the city of New York, as the 4th avenue, and is included within a space of 24 feet wide,
86 running through the centre of said avenue, and between 106th street and 116th street, and is bounded and described as follows, viz:

Northerly by the old road leading from Harlem to Harlem lane and McGown's pass; southerly by land of Mrs. Margaret McGown, and east and west by lines drawn parallel to the centre line of the 4th avenue at the distance of twelve feet on each side thereof.

To have and to hold the said premises and messuage above mentioned, with the appurtenances unto the said parties of the second part, and their successors, from the day of the date hereof, for and during the full period of time, during which the said parties of the second part may remain an incorporated company, and on which they are to construct their railroad, and for no other purpose, with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted, as may be necessary to support their work, not, however, extending beyond the width of the avenue.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

BENJ. L. BENSON. [L. S.]

Signed, sealed and delivered in the presence of

I. ADRIANCE.

CITY AND COUNTY OF NEW YORK, *ss.:*

On this first day of February, A. D. 1832, before me personally appeared Benjamin L. Benson, who is personally known to me, and he acknowledged to me that he executed the same as his act
87 and deed for the uses and purposes therein mentioned. I allow it to be recorded.

I. ADRIANCE,
Com'r of Deeds in the City of New York."

Defendants' counsel offered in evidence two photographs showing the structure of the railroad company and the property in question.

Received and marked Defendants' Exhibits 5 and 6, respectively.

Defendants' counsel offered in evidence lease from the New York and Harlem Railroad Company to the New York Central and Hudson River Railroad Company of its steam line of railroad north of the Grand Central depot, dated April 1st, 1873, for the term of four hundred and one years.

Received in evidence.

LORENZO S. PALMER, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to defendants' counsel:

I reside at 305 West 132d street. I am a real estate broker and appraiser. My office is in the Twelfth Ward Bank building, 125th street and Lexington avenue. I have been in the real estate business between 15 and 16 years. During that time I have bought,

sold and appraised and rented property. My operations have been principally in Harlem, east side. I examined the property, 1626 Park avenue, day before yesterday. It is a five-story brick and stone building. I understand it is 77 feet 10 inches on the avenue—that is what the map shows—and 26 feet on the street. It is about $\frac{4}{5}$ths of a full lot. I have made a calculation of the value of that property in 1892, which is $29,250; $8,250 for the lot and $21,000
88 for the building. In 1893 I value the property at $29,000; $8,250 for the lot and $20,750 for the building. In 1894, $28,750; $8,250 for the lot and $20,500 for the building. In 1895, $28,500; $8,250 for the lot and $20,250 for the building. In 1896, $28,250; lot $8,250, building $20,000. In 1897, $30,000; lot $10,500, building $19,500. In 1898, $29,500; lot $10,500, building $19,000. In 1899, $29,500; lot $11,00-, building $18,500. At the present day, $29,750; lot $11,250, building $18,500.

I have made an estimate of the rental value of this property from 1892 to date. In 1892 the rental value was $2,976, divided as follows: The corner store, $50 per month; the two adjoining stores on the avenue, $15 each; the first flat above the store, south, $23; north, $22; the second flat above the store, south, $22; north, $21; the third flat above the store, south, $21; north, $20; the fourth flat, south, $20; north, $19, making $2,976.

In 1893, 1894 and 1895 the rental value was about the same. In 1896 there was a slight depreciation. I figure it in that year $2,880. I figure an increase from 1897 up.

Q. Will you give us the figures?

A. The corner store, $60; the two inside stores on the avenue, $18 each. The first flat, south, $21; north, $20. The second flat, south, $20, north, $19. The third flat, south, $19; north, $18. The fourth flat, south. $18; north, $17, making a total of $2,976.

In 1898 and up to the present time the rental value was about the same.

I was familiar with the old structure before the present viaduct was put up in Park avenue in front of these premises. There was not access from one side of the avenue to the other. At the present day 115th street is a thoroughfare and there is free access across any portion of the avenue that never existed before. 115th street is 60 feet wide.

89 I am familiar with Lexington and Madison avenues and with the character of buildings on each of those avenues. There is a difference between the buildings on Madison and Park avenues between 110th and 125th street, and on Lexington and Park avenues.

Q. What is the difference?

A. The character of the buildings on both Lexington and Madison avenues are of a far superior quality to those on Park avenue. Most of them are steam heated flats, and in Madison avenue, from 120th to 125th street it is entirely private houses. That portion above 116th street and 120th street has been built up in the last two or three years—it was most all vacant ground—with a superior class

of houses. Most all of the houses on Park avenue are of a common tenement order.

I am familiar with the Verona flats, at 116th street and Lexington avenue, about which Mr. Whittle testified. I collected the rents there for 1887, 1888 and 1899 and 1900. The rents there as compared with the rents on Park avenue have depreciated. The exact number of vacancies on Park avenue, between 110th and 125th streets, is 80 apartments and 35 stores. I know that from personal investigation. There are far more stores on Park avenue than on Madison avenue in the same locality. The same thing appertains to Lexington avenue.

Cross-examination—In answer to plaintiff's counsel:

There are three vacant flats and two stores in the building on the southwest corner of Park avenue and 116th street. This count was made two weeks ago last Saturday.

I am not a salaried employee of the New York Central
90 and Hudson River Railroad Company. I am paid for each case in which I testify. I determine that the plaintiff's lot is four-fifths of a full lot in value by figuring out the area of the square feet. In a lot 25 x 100, and the area of this lot 70.6 something by 26 figures about four-fifths of a full lot. I use the Murray-Hoffman rule in my calculations on inside lots, not on corners. I base my calculation entirely upon the superficial area.

I went into business for myself in October, 1889. I have never, in my experience, built a house.

I collected the rents for the Verona for J. P. and E. J. Murray. I was an employee of that office at that time. I am and always have been in the renting business. My cards and note-heads show that. I always solicit renting if I can get it.

Q. You were examined in supplementary proceedings, were you not, a short time ago?

A. I was.

Q. Did you testify before Judge Haskell in the city court on May 17, 1900, as follows: "I do not collect rents or take charge of any property—simply buying and selling?"

A. I did, because I had nothing to collect from. I solicit renting, though.

Q. But at that time you did not collect rents or take charge of properties?

A. At that time I had no rents to collect, and no houses to collect rents from; at the same time I solicit the collection of rents.

Since the defendants' structure was elevated and trains began to run on it I have not rented any houses from 110th to 120th street, within two hundred feet of the structure. I had quite a few transactions for the six months prior to February of this year.

Q. Haven't you been adjudicated a bankrupt lately?

A. I have.

91 Q. And didn't you testify before the referee in bankruptcy that for six months previous to February, 1900, you had not earned anything?

A. I don't know as I did; no.

Q. I have here your examination in bankruptcy; let me hand it to you for the purpose of refreshing your recollection. (Handing paper to witness.)

A. (To the court:) Your honor, am I compelled to go into this testimony about private matters?

THE COURT: To a certain extent, yes, where it has a bearing upon your qualification as an expert. Of course, merely for the purpose of prying into your private affairs it will not be permitted; but in so far as it has a bearing upon your experience during the past six months, or during a period prior, it will be perfectly admissible.

Q. Have you refreshed your recollection from your testimony?

A. I have not read it yet. I will look it over.

Q. Look at the third question from the bottom, there?

A. (Reading:)

"Q. Have you earned any money in the last six months?

A. Yes, sir.

"Q. How much?

A. About $1,800 or $2,000.

"Q. When was that?

A. About February.

"Q. Have you earned any since?

A. About $300 or $400.

"Q. Do you know what became of that $1,800 or $2,000?"

Q. Now, the next question over the page.

A. (Reading:) "Four months past, five months, I didn't make anything for six months previous to that." Is that what you want to get at?

Q. That was true?

A. It might have been.

Q. Wasn't that testimony true?

A. It might have been; I would not deny that it was not.

Q. Have you had any sale on Park avenue from 110th street to 120th street since the elevation of the structure and the operation of trains thereon?

A. No, sir; I have not.

92 Q. Do you remember the sale of the property No. 1642 Park avenue, one door next to the northwest corner of 116th street and Park avenue?

A. What sale?

Q. Do you remember that that was sold after trains began to be operated on the structure for $19,000?

A. No, sir; I do not.

I testified that I heard of the sale of that property on the exchange, but I think it was previous to 1897; I would not be positive as to the date; I heard of a foreclosue sale at $19,000. My best recollection is that it was previous to 1897. I may be mistaken in

the date. I think it was in 1896. The structure was up in 1896, but trains were not in operation on it. To the best of my recollection, Mrs. Tilly Berger, in 1890, paid $26,000 for that property. I sold it in 1893 for $23,500, and in 1896 it sold for $19,000 at foreclosure.

I don't think I testified in the Larney case, before Mr. Justice Fitzgerald, that I did not base my valuations upon sales. It has some bearing upon my mind. I do not think a foreclosure sale is anything to go by. It might be some evidence of the value of property at the time of the sale. It don't always follow that you get the exact value for your property.

I understand that by rental value is meant the value a house is capable of producing when full, and by fee value what the house would sell for in the open market, but not at auction.

Q. The fee value is what it will sell for at private sale?

A. Well, mostly so, although there are times when a house will bring what I would consider it worth on the exchange; but eight times out of ten it won't, because the exchange is inhabited by speculators, who buy property with an idea of turning it over at
93 a profit on private sale, and, therefore, you do not realize the same amount of money that you would at a private sale.

I think that anything that would intercept the light coming into property would injure its fee and rental value to some extent, and anything that disturbs the quiet and repose of tenants interferes with the rental value; I also think that anything that invaded the privacy of an apartment would interfere with the rental value. Whether those elements would affect the rental value seriously and injuriously all depends upon the conditions that exist when the house was built. In this case the house was built upon an avenue which was always a railroad avenue, and those conditions existed at the time it was built, and the house would not feel the same effect as if a railroad was brought there after the house was built. To certain portions of the building I think as much light was taken away from the premises by the old structure as by the present structure—the first and second floors; the old structure, a blank wall, took away considerable light from there. Now, the third and fourth floors, the elevated structure, takes away some light, but there is a great deal of diffused light which lights up both the first and second stories, which were heretofore dark.

I think privacy has an effect on the rental value; also freedom from odors, cinders and dust; anything that would interfere with the stability of a building would affect its rental value to a certain extent.

Q. Have you used in the transaction of your private business the same degree of judgment that you have in forming your opinion as to the values of this property?

A. I don't know what you are trying to get at, I assure you.

Q. Can you answer the question?

A. I cannot answer that question; no, sir.

94 GEORGE F. BOULARD, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to defendants' counsel:

I live at 521 East 142d street. I am by profession a civil engineer, and during the progress of the Park Avenue improvement, so called, I was in the employ of the Park Avenue board as chief assistant engineer, and as such I had charge of the building of the viaduct structure at that time. I am familiar with the plans and maps of the structure and with the progress of the work that came under my direct supervision.

The map now shown me indorsed "Amended plan for the improvement of Park avenue north of 106th street in the city of New York, exhibiting by map, profile and cross-section the work of alteration and changes to be made in the structure and so on, between 111th and 115th streets, prepared for filing in the office of the comptroller in conformity with chapter 339 of the Laws of the State of New York, approved April 19th, 1892, and of the same law as amended by chapter 548 of the Laws of 1894, approved May 8th, 1894," was made under my direction. That is a copy of the original map. What I mean by that is, that this shows a section of the map which was made under my direction. It shows a section of the structure in front of the premises in suit at 115th street and Park avenue.

Defendant's counsel offered the said map in evidence.
Received and marked Defendants' Exhibit 7.
The above map is reproduced in the appendix to this case on appeal.

95 The map now shown me was also made under my direction, and shows that portion of Park avenue between 114th and 116th streets, practically—although it don't go to 116th street. It also shows a portion of the property on the northwest corner of Park avenue and 115th street, and it shows how our structure is with reference to the same. It is shown in the regular cross sections here; the dotted lines show the old and the very black lines show the new structure.

Defendant's counsel offered in evidence the last map identified by the witness.

In answer to plaintiff's counsel:

I did not make this map personally. It was made under my dictation. I have personally verified the measurements given on this map, and can swear that those measurements as given on the map are correct.

Map received in evidence and marked Defendants' Exhibit 8.
The above map is reproduced in the appendix to this case on appeal.

In answer to defendants' counsel:

Q. Now, will you take that map and say what the width of the old structure was at the south line of these premises at the northwest corner of 115th street and Park avenue—at the surface of the avenue?

A. At 115th street, at the surface of the avenue, the old structure was practically 56 feet and 4 inches. On the old structure the tracks almost came to the grade of the surface of the street at that time. It was shown and delineated just as shown on this map.

North of there the grade of the street changes and rises towards the north. At the north end of these premises the width of the old structure at the surface was 54 feet, the depth was 5½ feet. The width at the bottom was 50 feet in the clear, that is, between
96 walls. Now we are talking about the cut at the north line of the property. There was a slope in the foundation walls there; they backed into the avenue. At the base of the rail the wall set back 5 feet, making a total of 58 feet practically. There were four tracks in the old cut and the avenue there was 140 feet wide. The sidewalk on the west side in front of these premises is 15 feet wide. The height of the parapet wall of the old structure under the act of 1872 at the south end of these premises was practically 3 feet.

Q. Taking the new structure, how many rows of columns are there in front of these premises?

A. There are two bents. That makes six columns. There is one bent practically 2½ feet north of the building line of 115th street. The next one is 65 feet and 5 inches north of it. The side columns are 20 inches square, and the centre one is 24 inches square. From outside to outside of columns at the southernmost bent it is 53 feet and 8 inches, and at the northernmost bent 57 feet. The height of the rail base of the present structure above the present grade of the street at the south line of the premises is 34 feet and one-half inch, and on the north line 26 feet 11½ inches. The total width of the structure at the southernmost line of the premises is 56 feet 2 inches; that is the extreme outside width on the very dots. The extreme outside width at the northern part of these premises is 57 feet 8 inches. The total height of the structure at the southernmost part of these premises is 34 feet; at the northernmost part 31 feet. That is from the present grade of the street.

I was employed by the New York Central and Hudson River Railroad Company during the progress of the work under the act of 1872, but I was not employed upon the work. If my recollection serves me, trains began to run on the structure erected under the act of 1872 in 1874.

97 Cross-examination—In answer to plaintiff's counsel:

I have no record of the date when trains first began to be operated on the structure erected under the act of 1872. It is all from memory—in reference to 1872. I do not mean in reference to put-

ting down on the map. I have the data for that. I do not know when the commission required by the act of 1872 was organized, nor that it did not get to work until the spring of 1873. I think the construction was going on in 1873. In 1874 I know we were riding on the road to a certain extent, and the Fourth avenue was cut up and dug up and we were going down through it. It is possible that in 1874 the trains were operated on the easterly side of the avenue at this point.

Q. That is entirely outside of the lines of the present structure and of the structure of 1872?

A. I say that is possible. I do not deny that.

I am not an employee of the railroad company now. Of course I expect to be paid for my testimony. I have an understanding as to that.

The measurements made on the diagram from out to out of columns are at the surface of the avenue. The distance from the outside of the wheel guards to the house-line on the north line is 40 feet and 6 inches. From the outside of the westerly wheel-guard to the outside of the easterly wheel-guard, on the southerly line of columns, the distance is 59 feet.

Q. Does not the structure differ at the northerly line of columns from the structure at the southerly line of columns in front of these premises?

A. It changes right at the line. To a certain extent the structure south of the northerly line of columns—the road-bed—overhangs the columns.

Q. How much does the structure overhang the outside of the column in front of these premises?

98 A. One foot. I have not given the height of the hand-rail from the surface of the avenue. That is on top of the structure, and it is attached to the structure.

Q. What is the distance from the surface of the avenue to the top of this hand rail at the southerly line of columns in front of the premises?

A. That I cannot give you, but I can give you the total height up to the hand-rail up at 115th street; that is, up to the base of the rail. I think I have given you that already. When I gave the total height of the structure at the southerly line of columns in front of these premises, I meant from the present surface to the base of the rail. That is the top of the structure. The height of the rail there is six inches. I cannot say positively what the height of the hand-rail is. I think it is 3 feet, though. It is only as a guide; that is all; and it does not exceed 3 feet.

Redirect examination—In answer to defendants' counsel:

Q. How high from the pavement are these wheel-guards on the bottom of the columns?

A. They differ very materially as the street stands to-day. At the westernmost column on the southern bent in front of these

premises the wheel-guard is about 9 inches high above the pavement.

It only shows on the map as it should be according to grade, but not as you find it. The street is not graded in accordance with the grades that were established for it. The grade of the street is not put up to the lines which the structure is built for. This change in the structure which the plaintiff's counsel asked me about was ordered by the board for the Park Avenue improvement, which board did this work. The contractors made the change. The con-
99 tract for the superstructure was between the board for the Park Avenue improvement and the Elmira Bridge Company. The contract for the sub-structure was made between the board and John J. Hopper, and covered some of that ground there, I believe.

Re-cross-examination—In answer to plaintiff's counsel:

I think I remember when the tracks were laid on this present structure. It was about March, 1896, when we commenced to lay our first track on the structure.

Q. Those tracks were laid by the New York Central and Hudson River Railroad Company, were they not?

A. I suppose they were. It was by direction of the board for the Park Avenue improvement that the tracks were laid. I do not recall the fact the board wrote a letter requiring the work to stop, and the railroad company refused to stop the work of laying the tracks. There is no question but what is was necessary when they commenced to lay tracks to run construction trains over the structure to carry the rails there. Those trains were run by the New York Central and Hudson River Railroad Company and paid in the estimate for the Park Avenue improvement. I suppose every train that went on there was owned by the New York Central and Hudson River Railroad Company. I have no doubt about that at all.

Rebuttal:

JOHN H. WHITTLE, recalled by plaintiff in rebuttal, testified as follows:

I have had the premises on the southwest corner of Park avenue and 116th street in my hands since October, 1898. I had charge of those premises two weeks ago. I have heard the testimony
100 given by Mr. Palmer as to the number of vacancies in those premises two weeks ago. At that time there were two stores vacant and 17 apartments.

Cross-examination—In answer to defendant's counsel:

There are 37 apartments in the building. That is not Mr. Sanders' property. It is the United States Life Insurance Company's property, of which I am agent. There are 19 apartments in that portion of the building abutting on Park avenue itself. Two

weeks ago there was one vacancy on the first floor; on the second floor there were two; on the third floor two. That is five. On the fourth floor two. That is eight. On the top floor one. That is nine altogether, out of twenty-one, and that is all on Park avenue. There are four stores on Park avenue; two occupied and two vacant. On the Park Avenue side there are four apartments on each of the upper four stories and three on the first floor.

Plaintiff's counsel offered in evidence, from the register's office, deed from Benjamin L. Benson to Robert Henderson, dated October 15, 1825; recorded March 9, 1826, in Liber 200 of Conveyances, page 382.

This deed conveys "All those certain lots, pieces or parcels of land situate lying and being in the 12th (late 9th) ward of the city of New York and known and distinguished on a certain map of the lands of the said party of the first part made by J. F. Bridges, city surveyor, and bearing date September, 1825, and which map is now on file in the office of the register of the city and county of New York, as lots numbered 938, 939 and 940, together with all and
101 singular the rights, members, privileges, hereditaments and appurtenances whatsoever under the said above mentioned and described premises in any wise appertaining or belonging."

Objected to by defendants' counsel as immaterial, irrelevant and incompetent, upon the ground that the property conveyed by that deed is on the opposite side of Fourth avenue; and, further, upon the ground that it is not in rebuttal.

The COURT: I will receive the deed. If there be no materiality to it, it certainly cannot affect the defendants' rights in any way.

Exception to defendant.

Received in evidence.

Plaintiff's counsel offered in evidence, from the register's office, map number 115, entitled, "Map of the Third Avenue tract, formerly the property of B. P. Benson and Dr. Van Arsdale," and marked, "Surveyed September, 1825, by J. F. Bridges, New York."

This is the map referred to in the deed just put in.

Same objection, ruling and exception.

Received in evidence.

Following is a brief description of said map:

"On this map Fourth avenue and the intersecting streets are represented as laid out in accordance with the map of the city of New York as the latter was established under the Laws of 1807, chapter 115. Fourth avenue is shown of the width of 100 feet. The map represents lots laid off and numbered. Lot number 938 is represented as at the northeast corner of Fourth avenue and 115th street, and lot number 939 is just north of number 938. Lot number 940 is just north of number 939. Each of the lots named has a
102 frontage of 25 feet 2½ inches on Fourth avenue, and a depth of 100 feet. The 'Old road to Harlem' is represented as running in a northeasterly direction diagonally across Fourth avenue in front of the premises in suit."

Plaintiff's counsel offered in evidence the following allegation from the answer of the defendants:

"That on or about the 28th day of April, 1892, the plaintiff herein commenced an action as plaintiff in the supreme court, New York county, by Joseph Ullman, his attorney, against these defendants for an injunction and damages by reason of the defendants' railroad structure and the operation of trains thereon in Park avenue opposite that portion of the premises situated on the northwest corner of Park avenue and 115th street, having a frontage of 77 feet on Park avenue and 26 feet on 115th street; that the said action is at issue and pending and undetermined, and that the relief sought in said action, and the alleged facts upon which such claim for relief is founded, are in part identical with the plaintiff's claim for relief and with the alleged facts upon which such is founded in this action."

It is stipulated that the action just described was discontinued by an order entered February 27, 1900.

Plaintiff's counsel offered in evidence resolution passed by the board of aldermen January 20, 1832, concurred in by the board of assistant aldermen January 30, 1832, approved by the mayor February 1, 1832, in language following: "That the New York and Harlem Railroad Company be and are hereby authorized to take possession of the ground owned by the common council over
103 which the line of said railroad is ordered to be constructed, and that they be permitted to use the same during the continuance of the present charter for the purposes of a railroad, and that only, and when they cease so to use it, it shall revert to the corporation, provided always that the said land shall be so used as not to interfere with the use of the cross streets, and on condition, however, that if the said corporation shall not commence the said railroad and complete the same within the time limited by their charter, then the privilege hereby granted shall cease and be void."

Objected to by defendants' counsel as incompetent, immaterial and irrelevant, and as not rebuttal.

Objection overruled. Exception to defendants.

Testimony closed.

DEFENDANTS' COUNSEL: I move to dismiss the complaint as to each of the defendants on the following grounds:

I. That the plaintiff has failed to show that he had any property rights which were or have been taken by the defendants or either of them.

II. That the only loss or inconvenience, if any, shown is that resulting from the tearing up of Park avenue by the reconstruction of defendants' railroad, pursuant to legislative authority and direction, and from the additional noise incident to the operation of trains in the depressed structure erected under chapter 702 of the Laws of 1872, under the new viaduct structure and upon said viaduct structure erected under chapter 339 of the Laws of 1892 and its amendments.

III. That all of the acts complained of have been done, not
104 by these defendants or either of them, but by the board for the Park Avenue improvement above 106th street, established by chapter 339 of the Laws of 1892, their contractors and agents.

IV. That the plaintiff is barred by his own laches and acquiescence, and the laches and acquiescence of his predecessors in title, from maintaining this action.

V. That the defendants have obtained under the deed from Peter Poillon to the New York and Harlem Railroad Company, produced in evidence, and by prescription, the right to maintain and operate any lawful railroad structure, either upon, below or above the surface of Park avenue within the lines of the depressed cut structure under the act of 1872, without liability to the plaintiff for damages, it appearing that the viaduct railroad structure opposite the premises described in the complaint has been erected wholly within the space occupied by the defendants for railroad purposes for more than twenty years prior to the commencement of this action.

VI. That no material additional interference with the use and enjoyment of plaintiff's premises has been shown by reason of the elevation of the defendants' railroad from the permanent viaduct structure erected under chapter 702 of the Laws of 1872 to the structure erected under chapter 339 of the Laws of 1892.

VII. That the plaintiff has failed to show any loss of rents from his premises due to the permanent structure erected under chapter 702 of the Laws of 1872.

VIII. That the plaintiff has failed to show any loss in the rental value of his premises due to the permanent structure erected or in course of erection, under chapter 339 of the Laws of 1892.

105 IX. That plaintiff has failed to show that the defendants, or either of them, have been guilty of any negligence either in maintaining the depressed cut railroad structure erected under chapter 702 of the Laws of 1872, or in the operation of trains on said structure, or in the erection of the viaduct structure, or the operation of trains upon the viaduct structure erected under chapter 339 of the Laws of 1892.

X. That the plaintiff has an adequate remedy at law.

XI. That the plaintiff has failed to make out a case for any equitable relief.

XII. That it now appears that the portions of Park avenue which are, and for more than twenty years prior to the commencement of this action have been, used for the purposes of a public street, have not been used in any way in excess of or inconsistent with the use to which a street opened by the mayor, aldermen and commonalty of the city of New York, under the statute in such cases made and provided may be lawfully put.

XIII. That upon the completion of the railroad structure in 1874 or 1875, erected under chapter 702 of the Laws of 1872, the municipal authorities abandoned to the defendants for the sole and exclusive use of their railroad a strip of land along the centre of Park avenue about 59 feet in width, some portions of which had thereto-

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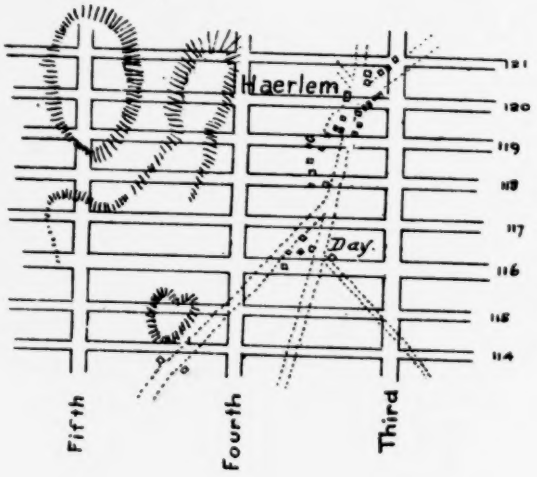
p. 109



SUPREME COURT
SPECIAL TERM PART 6
C. A. MORRISON
STENOGRAPHER

fore been devoted to the use of a public street subject to the rights of the defendant railroad companies.

XIV. That the plaintiff and his predecessors in title for more than twenty years prior to the commencement of this action acquiesced in such abandonment, and that the defendant railroad com-
106 panies have, by a continuous and exclusive use of said strip of land for railway purposes, acquired the right as against the plaintiff to maintain and operate the railroad structure erected under chapter 702 of the Laws of 1872.

XV. That the plaintiff and his predecessors in title for more than twenty years prior to the commencement of this action acquiesced in such abandonment, and that the defendant railroad companies have, by a continuous and exclusive use of said strip of land for railroad purposes acquired the right as against the plaintiff to maintain and operate any railroad structure authorized and required by law, and on said strip of land, whether below or above the established grade of Park avenue.

XVI. That it now appears under the evidence and the stipulation made by the respective parties in relation thereto that Park avenue was opened in 1853 by the mayor, aldermen and commonalty of the city of New York, subject to all the rights of the defendant The New York and Harlem Railroad Company, its successors and assigns, to maintain and operate a railroad in said avenue as then, or at any time thereafter, authorized and required by law.

Motion denied. Exception to each defendant.

The papers, maps, &c., not printed or reproduced in this case on appeal may be produced and used on any appeal herein by either party with the same force and effect as if the same were printed or reproduced in the record.

The foregoing case on appeal contains all the evidence taken and proceedings had on the trial of this action.

107 & 108 DEFENDANTS' EXHIBIT 1.

Copy of a part of a map entitled "A map of the city of New York, by the commissioners appointed by an act of the legislature passed April 3, 1807," upon which is inscribed the following:

"The commissioners appointed by an act entitled "An act relative to improvements touching the laying out of streets and roads in the city of New York and for other purposes" passed April 3, 1807, certify this map to be made in conformity with the provisions o' said act, and in witness thereof have hereunto subscribed their names and affixed their seals the twenty-second day of March in the year of our Lord one thousand eight hundred and eleven.

GOUVR. MORRIS.
SIMEON DE WITT.
JOHN RUTHERFORD."

(Here follows diagram marked p. 109.)

110 DEFENDANTS' EXHIBIT 2.

Copy of a part of a map entitled "Profile and map of the Fourth avenue as surveyed for the contemplated Harlem Railroad, New York, August, 1831, on which is inscribed the following:

"At a meeting of the board of directors of the New York and Harlem Rail Road Company in the city of New York on Tuesday the 13th September, 1831, it was resolved that the line of the route of their rail road be through the center of the Fourth avenue from the north side of 23rd street to Harlem river and also that the line of the route of the branch of the same be through the center of 125th St. from the center of the 4th avenue to the Harlem river and that the maps of the same as made by Edwin Smith, city surveyor, be presented by the common council of the city of New York, for the approval previous to the filing of the same in the pursuance of the requirements of the act of incorporation.

Witness *of* hands and seals.

CAMPBELL P. WHITE.
ISAAC ADRIANCE.
I. L. JESSUP.
A. HOSACK.
HENRY HONE.
JOHN LOZIER.
JOHN MASON.
SAM'L F HALSUP."

(Here follows diagram marked p. 111.)

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p 111

SUPREME COURT
SPECIAL TERM PART 2
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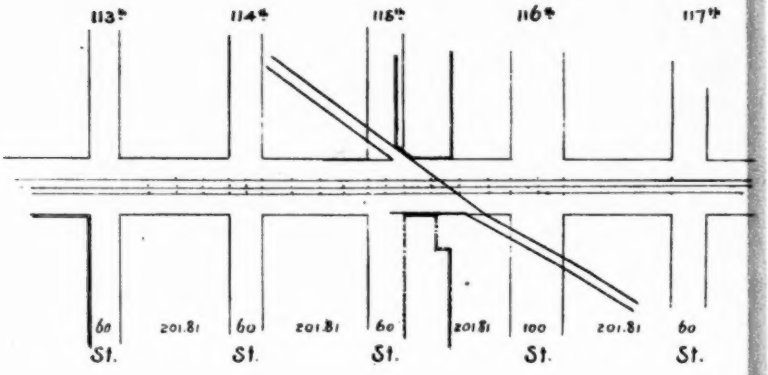

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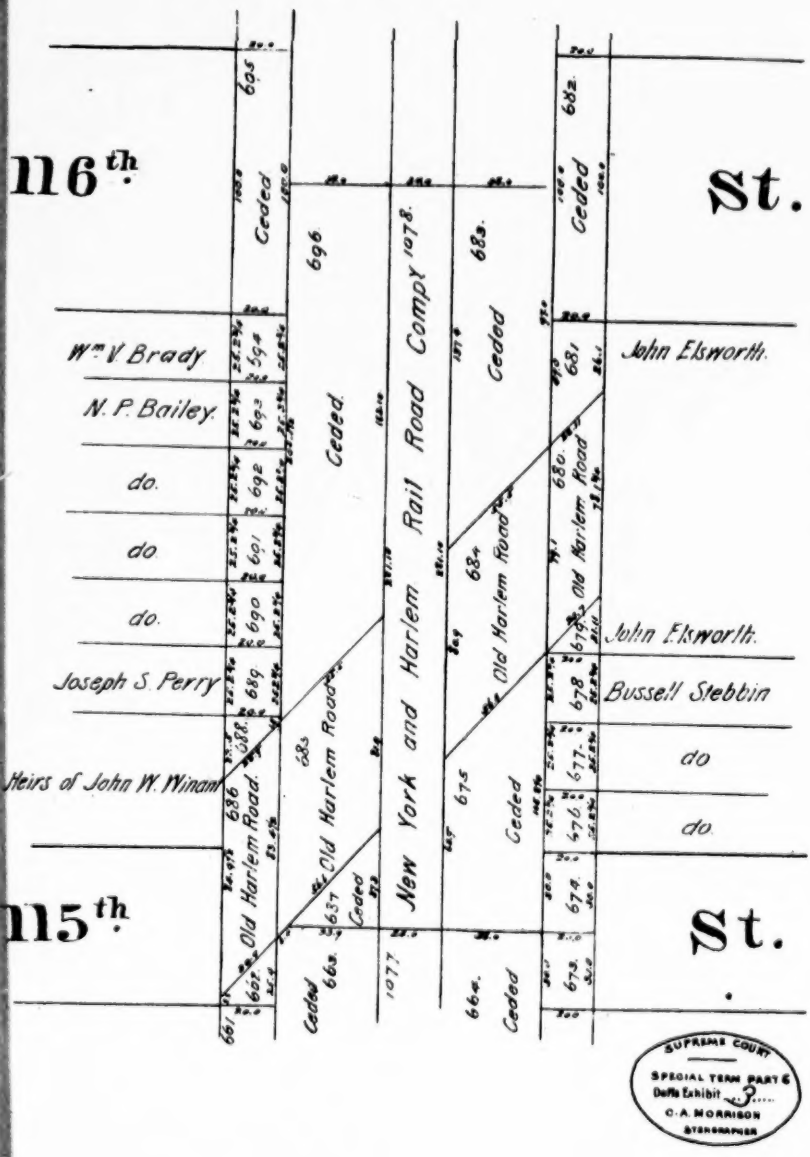
Mulliken
N.Y.H.R.R.Co.
} p. 113



SUPREME COURT
SPECIAL TERM PART 6
Defts Exhibit 3
C. A. MORRISON
STENOGRAPHER

112 DEFENDANTS' EXHIBIT 3.

Copy of a part of a map entitled: "Map of the property required for the opening and widening of Fourth avenue from 38th to 135th street, New York, 1850, by Isaac T. Ludlam, city surveyor."

(Here follows diagram marked p. 113.)

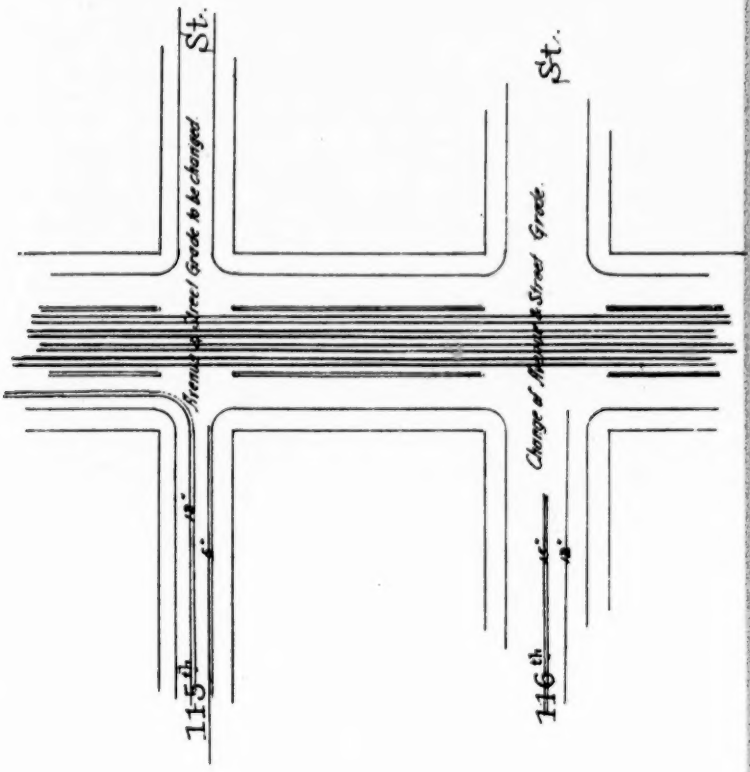
114 DEFENDANTS' EXHIBIT 5.

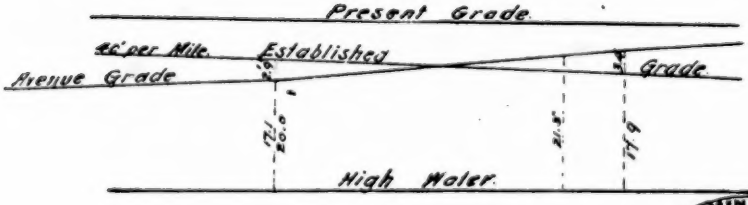
Copy of a part of a map entitled "Plan and profile of work to be done in conformity with the provisions of section 6 of the act entitled 'An act to improve and regulate the Fourth avenue in the city of New York,' passed May 14, 1872," and upon which is endorsed:

"By order of the board, New York, June 26, 1872. I. C. Buckhout, superintending engineer, 4th Ave. improvement."

(Here follows diagram marked p. 115.)

No 38
Muhlker
My. F. H. R. Co.
p. 115





SUPREME COURT
SPECIAL TERM PART 6
Defts Exhibit 5
C. A. MORRISON
STENOGRAPHER

116 New York and Harlem railroad.

Articles of agreement made this ninth day of January, one thousand eight hundred and thirty-two, between the New York and Harlem Railroad Company, parties of the first part, and the mayor, aldermen and commonalty of the city of New York, parties of the second part.

Whereas, an ordinance of the common council of the city of New York was passed by the board of aldermen on the sixteenth day of December, last, and by the board of assistants on the 19th day of December last, and approved by the mayor of said city on the twenty-second day of December last, which ordinance is in words and figures following, to wit:

A law to authorize the New York and Harlem Railroad Company to construct their railway.

Section 1. Be it ordained, etc., That the New York and Harlem Railroad Company be, and they hereby are, permitted to construct and lay down, in pursuance of their act of incorporation, a double or single track or railroad, or railway, along the Fourth avenue, from Twenty-third street to the Harlem river, in conformity with a map now on file in the register's office, and a branch thereof along One hundred and twenty-fifth street from the Fourth avenue to the Hudson river, provided that the width of such double railroad or way shall not exceed twenty-four feet.

Section 2. And be it further ordained, That if, at any time after the construction of the aforesaid railways by the said New York and Harlem Railroad Co., it shall appear to the mayor, alder-
117 men and commonalty of the city of New York, that the said railways, or any part thereof, shall constitute an obstruction or impediment to the future regulation of the city, or the ordinary use of any street or avenue (of which the said mayor, aldermen and commonalty shall be the sole judges), the said railroad company, or the directors thereof, shall, on the requisition of the said mayor, aldermen and commonalty, forthwith provide a remedy for the same, satisfactory to the said mayor, aldermen and commonalty; or, if they fail to find such remedy, they shall, within one month after such requisition, proceed to remove such railway, or obstruction or impediment, and to replace the street or avenue in as good condition as it was before the said railway was laid down; and, should the said directors decline or neglect to obey such requisition, the said mayor, aldermen and commonalty, may, upon the expiration of the time limited in such notice, cause the obstruction or impediment to be removed, and the avenues or streets restored as aforesaid, at the expense of the said railroad company.

Section 3. That the right of regulating the description of power to be used in propelling carriages on and along said railways, and

the speed of the same, as well as all other power reserved to the said mayor, aldermen and commonalty, by the act of incorporation of the said company, or any part thereof be, and the same are hereby, expressly retained and reserved.

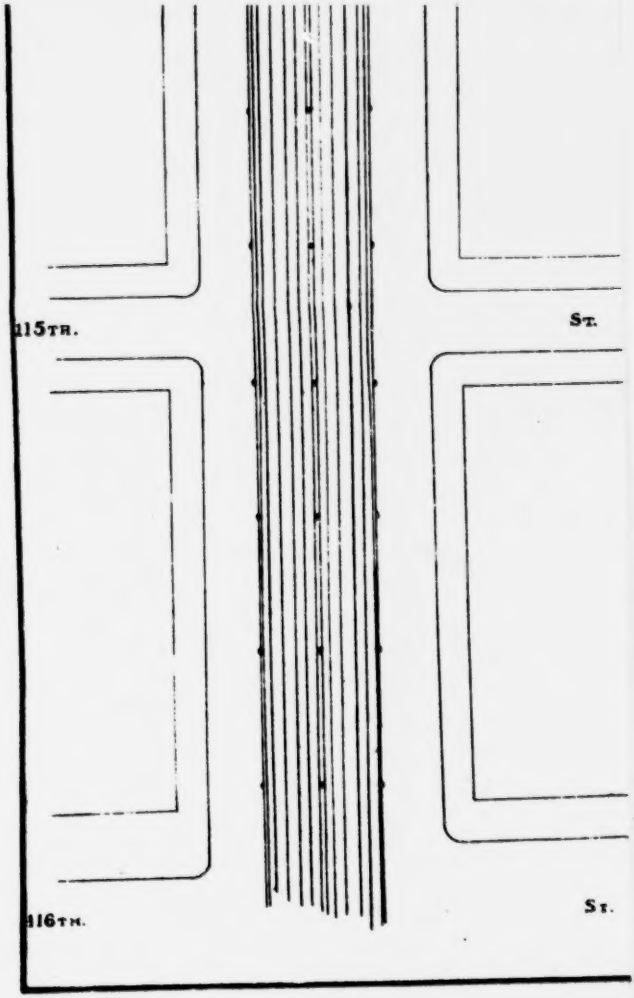
SECTION 4. That it shall expressly be incumbent on the said New York and Harlem Railroad Company, at their own cost, to construct stone arches and bridges for all the cross streets now or hereafter to be made (which will be intersected by the embankments or
118 excavations of the said railroad), and which, in the opinion of the common council, the public convenience requires to be arched or bridged, and also to make such embankments or excavations as (in the opinion of the common council) may be required to make the passage over the railroad and embankments, at the intersected cross streets easy and convenient for all the purposes for which streets and roads are usually put to; and also, that the said company shall make at their own like cost and charges, all such drains and sewers as their embankments and excavations may (in the opinion of the common council) make necessary; all which work to be done under the like requisition, and under like disabilities, as in the second section of this ordinance mentioned. And further, that the said company shall make their railroad path, from time to time, conform to what may hereafter be the regulation of the avenue and road through which said railroad passes.

SECTION 5. That it shall be incumbent on the said New York and Harlem Railroad Company to commence and complete their said railroad in the respective times allowed for that purpose in their act of incorporation; and unless they commence and complete the same in the periods of time for the said commencement and completion in said incorporation specified, that then the consent of the common council, and all the powers and privileges given in this ordinance, shall cease and be null and void.

SECTION 6. That in case the said railroad should not be completed within the times for that purpose in their charter mentioned, or, if any time after the construction of the said railroad, the same should be discontinued, or not kept up and in repair as a good and sufficient railroad, that then the strip of land to be taken for the
119 said railroad should be thrown open and become a part of the street or public avenue, without any assessment on the owners of the adjoining land or the public therefor.

SECTION 7. That no building shall be erected on the said strip of land to be taken for said railroad, and that a railing or other erections shall be made on the outer edges of the embankments or railroad path, and also such railing or fences on the edges of the excavations, as the common council shall, from time to time, deem necessary to prevent accidents and loss of lives to our fellow-citizens.

SECTION 8. That this ordinance shall not be considered as binding on the common council, nor shall the said ordinance go into effect until the said Harlem Railroad Company shall first duly execute (under their corporate seal) such an instrument in writing (promising, covenanting and engaging, on their part and behalf, to


115TH.
ST.
116TH.
ST.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

stand to, abide by and perform all the conditions and requirements in this ordinance contained) as the mayor and the counsel of the board shall, by their certificate approve, and not until such instrument shall be filed, so certified, in the comptroller's office of this city.

Passed by the board of aldermen, December 16, 1831.

Passed by the board of assistants, December 19, 1831.

Approved by the mayor, December 22, 1831.

Now, this agreement witnesseth, that for and in consideration of the premises, and in pursuance of the requirements of the eighth section of said ordinance, the said parties of the first part do hereby for themselves and their successors, promise, covenant and engage to and with the said parties of the second part and their successors and assigns, to stand, abide by and perform all the conditions and requirements in the said ordinance contained. 120–122

In witness whereof the said parties of the first part have hereunto affixed their corporate seal, and caused the same to be signed by their vice-president (in the absence of their president), and attested by their secretary, the day and year aforesaid.

JOHN MASON, [L. S.]
Vice-President.

Witness,
ISAAC ADRIANCE,
Secretary pro Tem.

(Here follow diagrams marked pp. 123 and 124.)

125 & 126 Pursuant to section 3301 of the Code of Civil Procedure we hereby stipulate that the foregoing are copies of the judgment roll, papers, notice of appeal and case and exceptions in this action on file in the office of the clerk of the county of New York.

Dated New York, February 25", 1901.

BUSHBY & BERKELEY,
Attorneys for Plaintiff, Respondent, and Appellant.
IRA A. PLACE,
Attorney for Defendants, Appellants, and Respondents.

It is hereby consented that the within-printed case on appeal may be ordered filed as and for the original case on appeal, as settled herein.

Dated New York, February 25", 1901.

BUSHBY & BERKELEY,
Attorneys for Plaintiff, Respondent, and Appellant.
IRA A. PLACE,
Attorney for Defendants, Appellants, and Respondents.

It is so ordered.

Dated New York, February 25", 1901.

DAVID LEVENTRITT, *J. S. C.*

127 At a term of the appellate division of the supreme court for the first department, held at the court house in the county of New York, on the 19th day of April, 1901.

Present: Hon. Charles H. Van Brunt, presiding justice.
" William Rumsey,
" Morgan J. O'Brien,
" Chester B. McLaughlin, justices.

HENRY MUHLKER, Plaintiff, Appellant, and Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants, Respondents, and Appellants. } Order.

The above-named plaintiff and the above-named defendants having appealed to the appellate division of the first department from the judgment herein entered in the office of the clerk of New York county on the 3d day of November, 1900, for an injunction and for $1,400 damages, with interest and costs, and said appeals coming on to be heard; now, after hearing James C. Bushby, Esq., of counsel for the plaintiff, and Ira A. Place, Esq., of counsel for the defendants, and due deliberation having been had, it is

Ordered that the said judgment be, and the same hereby is, affirmed, without costs to either party.

128 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff, Appellant, and Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants, Respondents, and Appellants. } Judgment.

The above-named plaintiff and the above-named defendants having appealed to the appellate division of the first department from the judgment herein entered on the 3d day of November, 1900, for an injunction and for $1,400 damages, with interest and costs, and said appellate division having ordered said judgment to be affirmed without costs to either party, it is

Adjudged, that the said judgment be, and the same hereby is, affirmed without costs to either party.

Judgment signed and entered this 29th day of April, 1901.

WM. SOHMER, *Clerk*.

129 Supreme Court, Appellate Division, First Department, April, 1901.

Chas. H. Van Brunt, P. J., William Rumsey, Morgan J. O'Brien, Chester B. McLaughlin, JJ.

HENRY MUHLKER, Appellant,
vs.
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Appellants. } No. 3027.

Cross appeals from a judgment entered upon a decision after trial at special term.

Mr. James C. Bushby, for plaintiff-appellant.
Mr. Ira A. Place, for defendants-appellants.

MCLAUGHLIN, *J.*:

This action was brought to recover damages resulting from the operation of defendants' railroad in front of plaintiff's premises on Park avenue in the city of New York, and to enjoin the future operations of such road.

The plaintiff had a judgment restraining the defendants from interfering with his easements of light, air and access to the premises

in question and fixing the amount of the fee and rental dam-
130 ages because of such prior interference. The judgment was in the usual form in actions brought for a similar purpose against the elevated railroad companies in such city, and provided that if the defendants within a time specified paid the amounts awarded for fee and rental damages that then the injunction should not become operative.

The facts established upon the trial, so far as the same relate to the plaintiff's right to recover at all, are substantially the same as those established upon the trials in Lewis *vs.* The New York & Harlem Railroad Co. (162 N. Y., 262), Fries *vs.* The New York & Harlem Railroad Co. (57 App. Div., 577), and Sanders *vs.* The New York & Harlem Railroad Co. (decided by this court March 8, 1901, and not yet reported, and for that reason it is unnecessary to re-state them here).

The origin of the defendants' claim to so much of the premises upon which their road stands as lies south of the "Old Harlem road" is precisely like the Lewis case, and the origin and source of plaintiff's title and of defendants' claim to premises lying north of the "Old Harlem road" are in all respects like the Sanders case; and the liability of the defendants to respond in damages from February 16, 1897, when they began to operate trains upon the steel viaduct, in so far as such operation interfered with the easements of light, air and access, was settled by the Lewis case, which was followed in both of the other cases cited.

The question of defendants having acquired title by adverse possession was considered by this court in both the Fries and Sanders cases. In the former it was said, "For these reasods the deed to the city was valid as against the railroad company, and it had no title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were those which it had acquired by
131 adverse possession. Within the rule laid down in the case of Lewis *vs.* New York & Harlem R. R. Co. (cited above), that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is above ground, in front of the plaintiff's premises. The case of Lewis applies fully to the one at bar." In the Sanders case this court followed the decision just quoted, the presiding justice dissenting on the sole ground that "Title by adverse possession as to the twenty-four feet strip, at least, was established by the evidence." * * * It is urged, however, that an error was committed in the admission of evidence as to the course of values of real estate on Madison and Lexington avenues subsequent to the year 1892. But a similar question was presented to and passed upon by a majority of this court in the Fries case, and it was there held that the evidence was not incompetent. It is also urged that the fee and rental damages awarded are excessive. A careful consideration of the evidence bearing upon that subject fails to sustain such contention. There is sufficient evidence to sustain the finding of the special term in this respect.

The judgment is right and should be affirmed, and inasmuch as both parties appeal from the judgment, we are of the opinion that costs should not be awarded to either of them.

Rumsey & O'Brien, J. J., concur.

Van Brunt, P. J., dissents.

132 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.
} Notice of Appeal to Court of Appeals.

SIRS: Please take notice that the defendant- above-named, and each of them, hereby appeal to the court of appeals from the judgment of the appellate division of the supreme court, first department, entered in the office of the clerk of New York county on the 29th day of April, 1901, upon an order entered in the office of the clerk of the said appellate division on the 27th day of April, 1901, adjudging that the judgment entered in this action in the office of the clerk of New York county on the 3d day of November, 1900, in favor of the above-named plaintiff and against the defendants, which judgment awarded the plaintiff herein an injunction unless the defendants paid the sum of three thousand dollars fee damages, and further awarded the plaintiff a money judgment against the defendants for the sum of eighteen hundred and sixty-one and 88/100 dollars, be affirmed, with one hundred and twenty-two and
133 35/100 dollars cost to the plaintiff, and from each and every part of said judgment.

Dated borough of Manhattan, N. Y. city, N. Y., June 12, 1901.

Yours, &c.,
IRA A. PLACE,
Attorney for Defendants-Appellants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

To William Sohmer, Esq., county clerk of the county of New York, county court house, borough of Manhattan, N. Y. city, N. Y.; and Bushby & Berkeley, Esqs., attorneys for plaintiff-respondent, 220 Broadway, borough of Manhattan, N. Y. city, N. Y.

134 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD Company *et al.*, Defendants.
} Notice of Appeal to Court of Appeals.

Please take notice that the above-named plaintiff hereby appeals to the court of appeals from the judgment of the appellate division

of the supreme court for the first department, entered herein on April 29, 1901, in the office of the clerk of New York county, affirming the judgment of the special term of the supreme court entered herein on November 3, 1900, in the office of said clerk, and from each and every part of the said judgment of the appellate division.

Dated New York, June 17, 1901.

Yours, &c., BUSHBY & BERKELEY,
Attorneys for Plaintiff.

Office and post office address, 220 Broadway, borough of Manhattan, New York city.

To Ira A. Place, Esq., attorney for defendants. William Sohmer, clerk of New York county.

135 In the Court of Appeals.

HENRY MUHLKER, Plaintiff, Respondent, and Appellant,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants, Appellants, and Respondents.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the judgment roll, papers, notices of appeal to the appellate division of the supreme court, case and exceptions, of the order of the appellate division and of the judgment entered thereon, and of the notices of appeal to the court of appeals, on file in the office of the clerk of the county of New York, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated borough of Manhattan, N. Y. city, N. Y., June 22, 1901.

BUSHBY & BERKELEY,
Attorneys for Plaintiff, Respondent, and Appellant.
IRA A. PLACE,
Attorney for Defendants, Appellants, and Respondents.

136 UNITED STATES OF AMERICA:

Supreme Court.

STATE OF NEW YORK, } ss:
County of New York, }

I, Thomas Hamilton, clerk of the county of New York and of the supreme court in said county, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the foregoing pages, ending with No. 135, contain a true and complete transcript of the record and proceedings had in said supreme court and in the court of appeals of the State of New York in the cause

of Henry Muhlker, plaintiff in error and plaintiff below,, against The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error and defendants below, as the same remain of record and on file in said office and that the same, together with the annexed original petition for said writ of error, the assignment of errors, the original citation to the defendants in error and undertaking to prosecute said writ of error and copy of the opinion of the said court of appeals, all of which were filed in the office of said clerk on the twenty-ninth day of July, 1903, and constitute the return to said writ of error.

M. J. D.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court this 29th day of July, A. D. 1903.

[Seal New York.]

THOS. L. HAMILTON,
Clerk of the Supreme Court in the County of New York.

137 [Endorsed:] U. S. Supreme Court. Henry Muhlker, plaintiff in error, against The N. Y. & Harlem R. R. Co., defendants in error. Return to writ of error. Bushby & Berkeley, attorneys for plaintiff in error. Office and post office address, 220 Broadway, borough of Manhattan, New York city.

138 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

The judgment herein, in favor of the plaintiff and against the defendants, having been entered in this court on the 3d day of November, 1900, upon a decision of the Hon. David Leventritt, J., for an injunction and for the sum of one thousand nine hundred and eighty-four and twenty-three hundredths dollars ($1,984.23), and the plaintiff and defendants each having appealed from said judgment to the appellate division of the supreme court for the first department, and the said judgment having been affirmed by the said appellate division and judgment of affirmance having been accordingly entered therein on the 29th day of April, 1901, and the said plaintiff and defendants each having appealed therefrom to the court of appeals, and the said court of appeals having sent hither its remittitur, filed herein on the 3d day of March, 1903, by which it appears that the said court of appeals has reversed the said judgment so appealed from, without costs, and has given judgment accordingly, and has remitted its said judgment to this court to be enforced ac-

cording to law, and this court having, by order dated the 4" day of March, 1903, and duly entered herein, ordered that the said judgment of the court of appeals be made the judgment of this
139 court; now, on motion of Ira A. Place, Esq., attorney for the defendants herein, it is

Adjudged, that the judgment of said court of appeals be, and the same hereby is, made the judgment of this court; and it is further

Ordered and adjudged, that the said judgments of the supreme court herein so appealed from be, and the same hereby are, reversed and the complaint dismissed, without costs.

Judgment signed and entered this 5th day of March, 1903.

THOS. L. HAMILTON, *Clerk.*

140 [Endorsed:] Supreme court. Henry Muhlker plaintiff, against The New York Central & Hudson River Railroad Company *et al.*, defendants Copy Judgment. Ira A. Place attorney for defendants, 417 Grand Central station, borough of Manhattan, New York city. To Bushby & Berkeley, Esqs. attorneys for plaintiff. Due and timely service of a copy of the within judgment & notice of entry is hereby admitted. Dated March — 1903. —— —— attorney for plaintiff. Rec'd M'ch 5, 1903.

[Endorsed:] Sirs: Please take notice that the within is a copy of a judgment duly entered herein, and filed in the office of the clerk of the county of New York on the 5th day of March 1903. Dated March 5th 1903 Yours, &c., Ira A. Place attorney for defendants, 417 Grand Central station, borough of Manhattan, New York city. To Bushby & Berkeley, Esqs. attorneys for plaintiff, 220 B'way.

141 At a special term of the New York supreme court, held in part II. in the county court house of New York county on the 15th day of June, 1903.

Present: Hon. Charles H. Truax, justice.

HENRY MUHLKER, Appellant-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Respondents-Appellants. } Order.

Upon reading and filing the annexed affidavit of James C. Bushby, and the annexed copy of the order of the court of appeals, directing the remittitur herein to be returned to that court, and on motion of Messrs. Bushby & Berkeley, attorneys for plaintiff, it is

Ordered that the clerk of this court deliver the remittitur herein, filed March 4, 1903, to the plaintiff's attorneys for transmission to the court of appeals pursuant to said order.

Enter,

C. H. T., *J. S. C.*

142 Supreme Court, County of New York.

HENRY MUHLKER, Appellant-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Respondents-Appellants. } Affidavit.

STATE AND COUNTY OF NEW YORK, *ss:*

James C. Bushby, being duly sworn, says that he is one of the attorneys for the plaintiff herein; that this case was appealed to the court of appeals, and was thereafter decided by said court, and the remittitur therefrom was filed in the office of the county clerk of New York county on March 4, 1903; that subsequently the plaintiff's attorneys moved in the court of appeals to amend said remittitur, and the said motion was granted, and the said remittitur was ordered to be returned, as more fully appears from the order of the court of appeals, a certified copy of which is hereto annexed; and that no previous application has been made for this order.

JAMES C. BUSHBY.

Sworn to before me this 15th day of June, 1903.

FRANK G. SWARTWOUT,
Notary Public, N. Y. Co.

143 STATE OF NEW YORK:

In Court of Appeals.

At a court of appeals for the State of New York, held at the capitol in the city of Albany, on the fifth day of June, A. D. 1903.

Present: Hon. Alton B. Parker, chief judge, presiding.

HENRY MUHLKER, Appellant-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Respondents-Appellants.

A motion having been heretofore made upon the part of the plaintiff herein for the return of the remittitur heretofore issued herein and to amend the same by inserting therein a recital showing that upon the argument of the above case in this court the plaintiff raised the following points, namely:

(1.) That chapter 339 of the New York Laws of 1892, and the acts amendatory thereof, violate section 1 of article XIV of the amendments to the United States Constitution, in that the said acts deprive the plaintiff of property without due process of law, which

said property consists of rights and easements of light, air, and access in and over Park (or Fourth) avenue in the city of New York, the said rights and easements being appurtenant to the plaintiff's premises abutting on said avenue.

(2.) That chapter 339 of the New York Laws of 1892, and the acts amendatory thereof, violate section 10 of article 1 of the United States Constitution, in the respect that the said acts impair the obligation of a contract, to wit, the contract under which Park (or Fourth) avenue in the city of New York was dedicated as a public street in and by the deed from Peter Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24, 1827; and in the further respect that the said acts impair the obligation of the contract existing among the parties to this action, and arising from the fact that the said parties all claim title under said Poillon through conveyances which recognize the character of said avenue as a public street, and which refer to public maps whereon said avenue is so represented.

And papers having been duly submitted thereon; and due deliberation having been thereupon had: it is

Ordered that said motion be and the same is hereby granted and the remittitur is ordered recalled in order that there may be inserted therein the clauses necessary to make the remittitur in this case the same as the remittitur in the cases of Kriete, O'Neil and Scholz against this defendant, decided June 2nd, 1903.

(A copy.)

[SEAL.] W. H. SHANKLAND, *Clerk.*

144 [Endorsed:] N. Y. supreme court. Henry Muhlker, plaintiff, against The N. Y. & Harlem R. R. Co. *et al.*, defendants. (Copy) Affidavit & order for return of remittitur. Bushby & Berkeley, attorneys for pl'ff, office and post office address, 220 Broadway, borough of Manhattan, New York city.

145 In the Supreme Court of the United States.

HENRY MUHLKER, Original Plaintiff and Plaintiff in Error,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Original Defendants and Defendants in Error.

Petition for Writ of Error.

To the Supreme Court of the United States:

The petition of Henry Muhlker respectfully shows that your petitioner, being the owner of certain valuable land and premises situate in the borough of Manhattan, city, county and State of New York, and abutting upon Park avenue, a public street in said borough, and city, was at the times hereinafter mentioned the owner

of certain property rights or easements in said avenue of light, air, access, etc.; that at or prior to the commencement of the above-entitled original suit or action the defendants therein, being the defendants in error above-named, The New York & Harlem Railroad Company and The New York Central and Hudson River Railroad Company, began to maintain and operate a permanent elevated railroad in said street or avenue in front of your petitioner's said premises.

That on or about January 7, 1897, your petitioner commenced said action against said defendants in the supreme court of the State of New York to recover the damages sustained by your petitioner by said maintenance and operation, whereby your petitioner claimed that his said property rights or easements had been permanently taken and impaired by said defendants, unlawfully and with-
146 out due compensation, and to recover an injunction against the further maintenance and operation of said elevated railroad, as appears by the complaint of your petitioner in said action. Said defendants appeared and as a defense to the said complaint, in said original suit or action, interposed an answer setting up in substance the provisions of certain acts of the legislature of the State of New York, namely, chapter 339 of the Laws of 1892, and other acts amendatory thereof, as command and authority to defendants to maintain and operate said elevated railroad without liability to compensate your petitioner for the value of his property rights taken as aforesaid.

That under the practice in said New York supreme court, no further pleading and no reply to said defense was allowed or required.

That said action came to trial thereafter in said supreme court at a special term thereof on the 8th day of October, 1900 before Hon. David Leventritt, justice, and thereupon and on November 3, 1900, the trial court overruled said defense and held the same to be invalid, and gave judgment in favor of your petitioner, the plaintiff therein, and against the said defendant railroad companies for $1,984.23 damages and costs and for an injunction, requiring said defendants to cease to appropriate further your petitioner's said property rights unless said defendants compensate your petitioner by the payment to him of $3,000, adjudged to be the value of said property rights so appropriated.

That upon appeal duly taken by both parties to the appellate division of the supreme court for the first department, the said judgment was duly affirmed and judgment of affirmance thereof entered on April 29, 1901.

That from said judgment of affirmance both parties thereupon appealed to the court of appeals of the State of New York, the same being the highest court of said State in which a de-
147 cision in the suit could be had. Whereupon the said court of appeals on February 24, 1903, made a final judgment or decree in said suit or action directing that the said judgment of the appellate division of the supreme court, so appealed from be re-

versed and plaintiff's complaint be dismissed and that the record be remitted to the supreme court of the State of New York to be enforced according to law. That said record was thereupon so remitted accordingly, and thereafter on March 5, 1903, final judgment was entered in and by said supreme court in obedience to the judgment of the court of appeals, and according to the law and practice of the State of New York, whereby it was adjudged that said judgment of the court of appeals be made the judgment of the supreme court, and that the judgment previously rendered in favor of your petitioner by said supreme court be reversed and your petitioner's complaint be dismissed as aforesaid.

That in said court of appeals there was drawn in question the validity of the said statutes of the State of New York and the authority exercised thereunder by defendants on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of their validity. That in said court of appeals it was claimed by your petitioner that the said acts of the legislature directed the taking of his private property without due process of law and therein offended against the provisions of the fourteenth amendment of the Constitution of the United States, and that said acts also contravened the provisions of section 10 of article I of the Constitution of the United States, which forbid the impairing of the obligations of a contract, namely, the contract or contracts under which your petitioner's said easements were created and exist.

That thereupon said court of appeals in said suit or action and in its decision therein overruled the said claims
148 of your petitioner and decided in favor of the validity of said statutes and the authority exercised thereunder, to the prejudice of your petitioner, all of which will more in detail appear from the record and assignment of errors herein.

Wherefore, your petitioner prays for a writ of error directed to the supreme court of the State of New York, commanding that court to send a record of the proceedings in the said suit or action aforesaid, and all things concerning the same, to the justices of the Supreme Court of the United States and for the usual citation, to the end that the record of the proceedings being inspected the said justices of the Supreme Court of the United States may cause further to be done therein to correct all errors what of right and according to the law and Constitution of the United States ought to be done.

And your petitioner will ever pray.

Dated, July 18th, 1903.

JAMES C. BUSHBY AND
L. M. BERKELEY,
Attorneys for Plaintiff in Error, 220 Broadway, Manhattan Borough, New York City.
HENRY G. ATWATER,
Of Counsel.

STATE OF NEW YORK, *County of New York,* } *ss:*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry Muhlker, being duly sworn, says: That he is the plaintiff in error herein; that the foregoing petition is true to the best of his knowledge information and belief.

HENRY MUHLKER.

Sworn to before me this 18th day of July, 1903.

[Seal of John F. Forrester, Notary Public, New York County.]

JOHN F. FORRESTER,
Notary Public, New York County.

Allowed this 27th, day of July, 1903.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

149 [Endorsed:] U. S. Supreme Court. Henry Muhlker, plaintiff in error, against The N. Y. & Harlem R. R. Co., & ano. defendants in error. Petition for writ of error. Bushby & Berkeley, attorneys for plaintiff in error Office and post office address, 220 Broadway, borough of Manhattan, New York city. Rend. July 20, 1903. Alton B. Parker, ch. J. Service of a copy of the within petition with notice of allowance is hereby admitted. Dated July 27, 1903. Ira A. Place attorney and solicitor for defendants in error and defendants below, The New York and Harlem Railroad Company and The New York Central and —.

150 In the Supreme Court of the United States.

HENRY MUHLKER, Original Plaintiff and Plaintiff in Error,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Original Defendants and Defendants in Error.
} Assignment of Errors.

Afterwards, to wit, on the eighteenth day of July, in the year of our Lord, one thousand nine hundred and three, in this same term before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes Henry Muhlker, the plaintiff in error and plaintiff below, and by his attorneys James C. Bushby and L. M. Berkeley, and his counsel Henry G. Atwater, says:

That in the record, proceedings, decision and final judgment of the court of appeals of the State of New York, and of the supreme court of the State of New York aforesaid, in the above entitled suit or action, there is manifest error in this, to wit:

I. That by the record, aforesaid, it appears that the judgment aforesaid given, was given by the court of appeals of the State of New York against the said Henry Muhlker, plaintiff in error, and in favor of The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error; whereas, by the law of the land the said judgment ought to have been given for the said Henry Muhlker against the said New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company.

151 II. That the said court of appeals of the State of New York erred in holding and deciding that the complaint of the plaintiff in error herein and plaintiff below should be dismissed.

III. That the said court of appeals of the State of New York erred in holding and deciding that, under the statute authorizing or requiring the erection and maintainance of the elevated railroad structure and the operation thereon of trains as complained of by the plaintiff in error and plaintiff below herein, the said plaintiff has no remedy against the defendants in error and defendants below, herein; thereby holding and deciding that the said plaintiff might be and has been deprived of his property by said defendants without due process of law; the said court of appeals, thus holding and deciding in violation of the Constitution of the United States and especially of section I, article XIV of the amendments to said Constitution.

IV. That the said court of appeals of the State of New York erred in holding that chapter 339 of the Laws and Statutes of 1892 of the State of New York, is constitutional and that it does not offend against that portion of the fourteenth amendment of the Constitution of the United States, providing that a person shall not be deprived of property without due process of law; whereas in fact and in law the said act and statute is repugnant to section I, of article XIV of the amendments to the Constitution of the United States; and further that whereas the property of the said plaintiff, as shown by said record and proceedings consists of rights and easements of light, air and access in and over Park or Fourth avenue, a public street in the city of New York, appurtenant to the premises of the said plaintiff in error, abutting on said avenue, the said court of appeals of the State of New York erred in deciding in favor

152 of sustaining the validity of said act and statute of said State, the effect of which has been to deprive said plaintiff of said property without due process of law.

VI. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under chapter 339 of the Statutes of 1892 of the State of New York, namely, the authority to take by or on behalf of the defendants in error and defendants below, the said plaintiff's property,

consisting of rights and easements of light, air and access appurtenant to his said premises, without compensation to him and without due process of law, in violation of section I of article XIV of the amendments to the Constitution of the United States.

VII. That the said court of appeals of the State of New York erred in holding and deciding that the said State had authority and that the authority exercised by the State and under the statute aforesaid was valid to compel or allow defendants in error to maintain a railroad viaduct and to operate trains of cars thereon in front of the said property rights and easements, of the said plaintiff in error and that the said defendants in error were under no liability to compensate said plaintiff in error therefor, or for the injury inflicted upon his said premises by reason of such maintenance and operation, and that the taking of a portion of the property of the plaintiff in error in the manner complained of, was and could be made valid by statute, that is by chapter 339 of the Laws of 1892 of the State of New York; and that said holding and decision of said court of appeals, was, and is repugnant to section I of article XIV of the amendments to the Constitution of the United States.

VIII. That the said court of appeals of the State of New York erred in holding that chapter 339 of the New York Laws of 1892 is constitutional and that it does not contravene section 10 of
153 article I of the Constitution of the United States forbidding the impairment of the obligation of contracts; whereas in fact and in law the said act is repugnant to the said section in that it does impair the obligation of a contract, namely, the contract under which Park or Fourth avenue in the city of New York was dedicated as a public street in and by the deed from Peter Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24th, 1827, and set forth in the record of the proceedings herein; and said statute further impairs the obligation of the contract existing among the parties to this action arising from the fact that the said parties all claim title under said Peter Poillon through conveyances which recognize and establish the property rights of the plaintiff in error as aforesaid.

IX. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under said statute and under chapter 339 of the Laws of the State of New York, of the year 1892, whereby the easements and rights of the property of the plaintiff in error aforesaid were taken and appropriated by defendants in error and thereby he was deprived of said property rights and easements without compensation, for the reason that said authority was repugnant to section 10 article I of the Constitution of the United States, in the respect that it impairs the obligation of said contracts in last assignment referred to.

X. That the said court of appeals of the State of New York erred in holding and deciding that the defendants in error were and are under no liability to compensate the plaintiff in error for the damages and injury inflicted upon his said premises by reason of either the erection, maintenance and operation of said viaduct structure or the

operation of trains in front of plaintiff's premises and in holding and deciding that said defendants were and are protected from
154 such liability by the authority of a statute of said State, namely, chapter 339 of the Laws of 1892 thereof, such decision being repugnant to the Constitution of the United States and to section 10 of article I and to section I of article XIV thereof.

Wherefore, the said Henry Muhlker, plaintiff in error and plaintiff below, prays that the said judgment of the said court of appeals of the State of New York be reversed, annulled and altogether held for nothing and that he may be restored to all things which he has lost by occasion of the said judgment, etc., and that he may have such other and further relief, according to law, as to the court may seem just and proper.

JAMES C. BUSHBY AND
L. M. BERKELEY,
Attorneys for Plaintiff in Error,
220 *Broadway, Borough of Manhattan, New York City.*
HENRY G. ATWATER,
Of Counsel.

155 [Endorsed:] U. S. Supreme Court. Henry Muhlker plaintiff in error, against The N. Y. & Harlem R. R. Co., and ano., defendants in error. Assignment of errors. Bushby & Berkeley, attorneys for pl'ff in error Office and post office address, 220 Broadway, borough of Manhattan, New York city. Service of a copy of the within assignment of errors is hereby admitted. Dated New York July 27, 1903. Ira A. Place attorney and solicitor for defendants in error and defendants below, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

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Citation.

UNITED STATES OF AMERICA, *ss:*

To the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York for the county of New York, wherein Henry Muhlker is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court of the United States, this 27th day of July, in the year of our Lord one thousand nine hundred and three.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

157 [Endorsed:] U. S. Supreme Court. Henry Muhlker, plaintiff in error, against The N. Y. & Harlem R. R. Co., *et al*, defendants in error. Citation. Bushby & Berkeley, attorneys for plaintiff in error, Office and post office address, 220 Broadway, borough of Manhattan, New York city. Service of a copy of the within citation with notice of allowance is hereby admitted. Dated, New York, July 27, 1903. Ira A. Place attorney and solicitor for defendants in error, The New York and Harlem R. R. Co., and The New York Central and Hudson River Railroad Co.

158 Know all men by these presents, that we, Henry Muhlker of the city, county and State of New York, as principal, and American Bonding Company of Baltimore, having an office and principal place of business for the State of New York, at No. 253 Broadway, in the borough of Manhattan, in the city of New York, as surety, are held and firmly bound unto the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company, both corporations organized under the laws of the State of New York, in the full and just sum of five hundred dollars, to be paid to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company their certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of July, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a plea in the court of appeals of the State of New York, held at Albany, N. Y. on February 24, 1903, in a suit depending in the supreme court of the State of New York, between the said Henry Muhlker, plaintiff, and The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants, a judgment upon return from said supreme court was rendered against the said Henry Muhlker and in favor of the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company dismissing his complaint, without costs, and the said Henry Muhlker having obtained a writ of error, and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washing-
159 ton, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Henry Muhlker shall prosecute said writ of error to effect,

and answer all costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

HENRY MUHLKER. [SEAL.]
AMERICAN BONDING COMPANY
OF BALTIMORE,
By HOWARD ABRAHAMS,
Vice President.

Attest: D. C. MACKEY,
Assistant Secretary.

[Seal American Bonding Company of Baltimore. Incorporated 1894.]

Sealed and delivered this 18th day of July, 1903, in presence of—
JAMES C. BUSHBY.
HULBERT T. E. BEARDSLEY.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On the 18th day of July, 1903, before me personally came Howard Abrahams, to me known, who, being by me duly sworn, did depose and say, that he resides in the city of New York; that he is the vice-president of American Bonding Company of Baltimore, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720, of the Session Laws of the State of New York for the year 1893. And the said Howard Abrahams further said that he was acquainted with D. Clinton Mackey, and he knew him to be the assistant secretary of said company; that the signature of said D. Clinton Mackey, subscribed to the within instrument is the genuine handwriting of the said D. Clinton Mackey, and was subscribed thereto by like order of the board of directors, in the presence of him, the said Howard Abrahams.

[Seal of Hulbert Ten Eyck Beardsley, Notary Public, New York.]

HULBERT T. E. BEARDSLEY,
Notary Public, New York Co.

160 STATE OF NEW YORK, }
City and County of New York, } *ss:*

On the 18th day of July, 1903, before me personally came Howard Abrahams, to me known, who, being by me duly sworn, did depose and say, that he resides in the city of New York; that he is the vice-president of American Bonding Company of Baltimore, the corporation described in and which executed the within instrument; that

he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York for the year 1893. And the said Howard Abrahams further said that he was acquainted with D. Clinton Mackey, and he knew him to be the assistant secretary of said company; that the signature of said D. Clinton Mackey subscribed to the within instrument is the genuine handwriting of the said D. Clinton Mackey, and was subscribed thereto by like order of the board of directors, in the presence of him, the said Howard Abrahams.

[Seal of Hulbert Ten Eyck Beardsley, Notary Public, New York.]

HULBERT T. E. BEARDSLEY,
Notary Public, New York Co.

Extracts from Charter of American Bonding Company of Baltimore.

"The said company shall be and is hereby authorized and empowered to insure the fidelity of persons holding places of trust or responsibility to or under any State, county, city, corporation, company, person or persons whatsoever; to become security for the faithful performance of any trust office, duty, contract or agreement, and to supersede any judgment or to go upon any appeal or other bond."

* * * * * * *

"That the directors shall * * * elect from their number * * * an executive committee."

"The executive committee so chosen * * * shall have power to elect non-resident local boards, non-resident local vice-presidents and non-resident local assistant secretaries * * * with power to sign and deliver bonds of suretyship and other obligations for and on behalf of and in the name of said company to the same effect and with the same binding obligation as if the said instrument had been executed by the president or vice-president and secretary or assistant secretary * * *"

"That the name of the said corporate body is * * * changed from 'The American Bonding and Trust Company of Baltimore City' to the 'American Bonding Company of Baltimore.'"

* * * * * * *

Extract from minutes of a meeting of the executive committee, held at the office of the company at Baltimore, Maryland, on the 10th day of November, 1902. * * *

Mr. Ernest Hoen, Jr., presented the following resolution, seconded by Mr. James S. Woodside:

"Preamble.—Whereas, in virtue of a certain resolution dated the "thirty-first day of July, 1902, Howard Abrahams and William P. "Flanders were declared, appointed or elected vice-presidents, and "Henry J. Sage, Hulbert T. E. Beardsley, Edward B. Southworth, "Jr., and D. Clinton Mackey were declared, appointed or elected "assistant secretaries, to serve in the city of New York, State of New "York; now, therefore,

"Resolved, That said appointments or election of said persons, for "reason, is hereby declared null and void, and all powers granted "under said resolution, are hereby revoked; to more definitely de- "termine the purpose and intention of said annulment and revoca- "tion, be it further

"Resolved, That Howard Abrahams of New York city, New York, "and Henry J. Sage, of the same place, be and are hereby appointed "resident vice-president and assistant secretary, respectively, of this "company at New York city, New York, with power to execute "bonds on behalf of the company for its business and in accordance "with its charter. That in the absence of the said Howard Abra- "hams, Hulbert T. E. Beardsley, of the same place, be and he is "hereby authorized to act as resident vice-president, and with the "same power as the said Howard Abrahams: and that in the ab- "sence of the said Henry J. Sage, either, Edward B. Southworth, Jr., "or D. Clinton Mackey, of the same place, be and are hereby au- "thorized to sign all bonds and undertakings issued by the company "as assistant secretary, in attestation of the seal of the company "affixed thereto."

"And on ballot, a majority of the whole committee having voted "in the affirmative, the said resolution was adopted, and the afore- "said nominees were declared to be duly elected as such officers of "the company with powers as aforesaid."

I, D. Clinton Mackey, assistant secretary of American Bonding Company of Baltimore, hereby certify that the foregoing are true and correct copies taken from the records of American Bonding Company of Baltimore.

In witness whereof, I have hereunto subscribed my name and affixed the corporate seal of American Bonding Company of Baltimore, at New York city, N. Y., this 18th day of July, 1903.

[Seal of American Bonding Company of Baltimore. Incorporated 1894.]

D. C. MACKEY,
Assistant Secretary.

Statement of American Bonding Company of Baltimore at the Close of Business, December 31st, 1902.

Capital paid in	$1,000,000.00
Stockholders' liability	1,000,000.00
Reserve for reinsurance	294,888.76
Surplus and undivided profits	332,450.58
Total	$2,627,339.34

Assets.		Liabilities.		
Stocks and bonds (market value)	$1,446,626.00	Capital stock		$1,000,000.00
Outstanding premiums, less commissions	85,528.35	Collateral and special deposits and bills payable		456,322.03
Accounts receivable, secured	155,363.18	Due for re-insurance		1,083.20
Interest accrued	15,851.70	Special reserve for reported losses, proofs not filed		70,885.70
Real estate	69,569.26	Legal reserve	$294,888.76	
Furniture and fixtures	1.00	Surplus and undivided profits	332,450.58	
Loans, (mortgage, time and call)	235,736.80			627,339.34
Cash in offices and depositories	146,953.98			
	$2,155,630.27			$2,155,630.27

STATE OF NEW YORK, *City and County of New York,* } *ss:*

I, Howard Abrahams, vice-president of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true statement of the assets and liabilities of the said company at the close of business, December 31st, 1902.

In testimony whereof I hereunto set my hand and affix the seal of the company this 18th day of July, 1903.

[Seal of American Bonding Company of Baltimore. Incorporated 1894.]

HOWARD ABRAHAMS.

Subscribed and sworn to before me this 18th day of July, 1903.

[Seal of Hulbert Ten Eyck Beardsley, Notary Public, New York.]

HULBERT T. E. BEARDSLEY,
Notary Public, New York Co.

161 Approved by—

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

162 [Endorsed:] U. S. Supreme Court. Henry Muhlker, plaintiff in error, against The N. Y. & Harlem R. R. Co., *et al.*, defendants in error. Undertaking to prosecute writ of error.

Bushby & Berkeley, attorneys for plaintiff in error, office and post office address, 220 Broadway, borough of Manhattan, New York city. Service of a copy of the within undertaking with notice of approval is hereby admitted. Dated New York, July 27, 1903. Ira A. Place, attorney and solicitor for defendants in error, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

163 *Opinion of Court of Appeals, State of New York.*

In the Court of Appeals.

HENRY MUHLKER, Respondent and Appellant,
vs.
NEW YORK & HARLEM R. R. Co. and NEW YORK CENTRAL & Hudson River R. R. Co., Appellants and Respondents.

(Decided February 24, 1903.)

L. M. Berkeley and James C. Bushby for plaintiff.
Ira A. Place for defendants.

PARKER, *Ch. J.:*

The facts of this case present the same question that was before this court in the Lewis case (162 N. Y., 202) and the Fries case (169 N. Y., 270) and that is, whether defendant is liable for any damages that may have been sustained by plaintiff by reason of the interference with his easements of light, air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging to the plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the
164 surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the State compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the State pursuant to ch. 339 Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that prior to the time when the operation of its trains was transferred from the subway to the viaduct it had acquired the right as against the abutting owners to maintain its railroad and run its train along and over Fourth avenue. (Fries case, *supra.*)

In 1890 Congress passed an act directing the Secretary of War to cause the bridges over the Harlem river to be replaced by other bridges which should be at least 24 feet above the high water of the spring tides. (U. S. Statutes at Large, vol. 26, p. 437.) As defendant's road crossed one of these bridges compliance with the provisions of this act made necessary a change in the grade of defendant's railroad, and the act provided that such changes should be made as soon as the necessary legislation could be obtained to authorize a change in the grade of the approaches to the bridge.

About two years later the legislature passed the act already referred to by which it undertook to accomplish the result aimed at by Congress in such a manner as actually to improve the use of the street itself, a part of the scheme being to compel this defendant to operate its road upon a steel viaduct elevated above the ground, thus giving the public the use of the whole of the surface of the street, which before was impossible.

This improvement was made by the State for the benefit of the public, the expense of it, by the mandate of the State, being borne by the city and this defendant in equal proportions. What
165 was done by the State and the legal effect of its action upon the rights of this defendant cannot be better stated than it was by Judge Vann in the Lewis case (*supra*) and so I quote it:

"That structure was not erected by the defendants, but by the State, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did but not for what the State did. (Atwater *vs.* Trustees of Vil. of Canandaigua, 124 N. Y., 602.) The State created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by the command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park Avenue board, which was not their agent, but a governmental agency of the State. (Benner *vs.* Atlantic Dredging Co., 134 N. Y. 156, and cases cited on page 162.)
166 Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company 'had no choice left

to it. The State intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations is was powerless to prevent.' * * * The statute 'authorized and directed' the defendants to operate their trains on the structure 'when completed.' Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the State they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction, Their acceptance did not reach back and adopt the previous acts of the State, but the effect was the same as if they had purchased it from the State on the day they commenced to use it."

Although at the time of the decision of the Lewis case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was, briefly, that the State, setting about making improvements in Fourth avenue which were to benefit the general public, found defendant in possession of four tracks in the middle of the
167 avenue, with the right to operate its trains upon them, which it was enjoying. The State could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the State builded the viaduct over the part of the street formerly occupied by the subway and compelled it to stop running its trains in the subway and to run them on the viaduct instead. The State had the power to do these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the State had built.

The plaintiff was injured by the change, as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the State, which had the power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the State.

When the question was again presented, therefore, as it was in the Fries case (*supra*), we attempted to cure the error which we concluded we had made in the Lewis case. The opinions in the Fries case

were written by Judge O'Brien and Judge Martin. In the course of Judge O'Brien's opinion it is said:

"I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or
168 fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement, for which the railroad was not responsible. The law is well settled in this State that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria*."

Judge Martin states the principle as follows:

"It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in accordance with the direct and express mandate of that statute That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill, and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensation than the benefit he derives from the social compact."

169 The judgment was accordingly reversed. That decision was deliberately and carefully made, and reflected the view of a majority of the members of this court at that time, and still does.

The dissenting opinion cited, and correctly, the Reining case (128 N. Y., 157), as authority for the proposition that "while the public authorities may raise the grade of a street for a street use, or may authorize the construction of a surface railroad on the street, in either case without liability to the abutters, they cannot raise the grade of a street *for the exclusive use* of a railroad without compensating an abutter for the injury inflicted." But that proposition is not involved in this case. Here the State did not authorize a change in the street for the exclusive use of the railroad. The change was made for the public benefit as well as for that of the railroad, and for that reason the State compelled the city of New York to pay one-half of the expense of it.

The decisions in the elevated railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for.

It is again urged on this appeal that the act under which these changes were made is unconstitutional, and hence that defendant need not have obeyed its commands. But that question was considered and passed upon by this court in the Fries case, every member of the court, whether voting with the majority or minority, agreeing that the act was constitutional. Judge O'Brien said, in discussing the constitutional question: "I think it would be
170 difficult, in view of the authorities cited, to state any ground upon which it can be questioned." And Judge Martin commenced his opinion by saying: "Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute under which the acts complained of were performed was valid, and that the legislature did not transcend its powers in enacting it." And Judge Cullen said: "The statute is not unconstitutional and no decision to that effect is necessary to secure plaintiff's rights."

We still think, under the authority of Radcliff's Executors *vs.* Mayor, etc., of Brooklyn (4 N. Y., 195), and the other cases cited by Judge Martin in his opinion in the Fries case, that the State had the power to make this improvement, as it did, without compensation to the abutting owners. Undoubtedly the State had also the power to provide in the act for compensation to abutting owners, and to apportion the expense incurred in the acquisition of the easements destroyed upon the defendant and the city of New York, as it apportioned the expenses of building the viaduct and making the other changes in the street; and it still has the power to authorize ascertainment of the damages to the abutting owners through its court of claims and to provide for their payment, and it may well be that it would be equitable for it to do so. But that it possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as resulted from the partial destruction of their easements of air, light and access, we have no doubt. Indeed, if in the judgment of the legislature it had seemed wise and just to do so, it could have assessed a portion of the expense of the improvement upon the abutting owners
171 instead of placing it all upon the defendant and the city.

The judgment should be reversed and the complaint dismissed, without costs.

BARTLETT, *J.* (dissenting):

This is one of a large number of cases brought against the defendant railroad companies to recover damages for the erection of the steel viaduct in Park avenue, extending from near 106th street to

the Harlem river, and over which the defendants operate their railroad with some two hundred trains a day.

The plaintiff recovered three thousand dollars fee damages and fourteen hundred dollars rental damages from February 16th, 1897, to October 10th, 1900, which was the date of the trial. The former date, February 16th, 1897, is the day on which the defendant companies began running their trains. The judgment of the appellate division was entered on the 29th day of April, 1901.

The case of Fries against these defendants was not decided in this court until December 31st, 1901. (169 N. Y., 270.)

The plaintiff appealed from the judgment on the ground that they were limited in their recovery by an improper rule as to the measure of damages, the court holding that he was not entitled to recover damages prior to February 16th, 1897, the day the steel viaduct was completed.

The counsel for the defendants also appeals, contending that our decision in the Fries case is conclusive as to all questions presented in the case at bar, and nothing remains to be decided.

The counsel for the plaintiff attempts to distinguish these
172 cases as follows: (1) That in the Fries case there was a finding that the defendants had "acquired the right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897," and in the case at bar there is no such finding; (2) that Fourth or Park avenue, in front of the premises in suit, was a public street prior to the defendants' entry into the same. (The premises involved are situated at the northwesterly corner of Park avenue and 115th street, and the viaduct structure of iron and steel in front of these premises is about 59 feet wide, and consists of four tracks laid on a steel structure, having a mean elevation of about 31 feet above the surface of said avenue. Prior to the erection of this viaduct, the tracks in the subway were at the south line of the plaintiff's premises, about level with the surface of the avenue, and at the north line about five and one-half feet below it. This subway was completed and trains began to be operated in it in 1878); (3) that in the Fries case the act of 1892 was assumed to be constitutional, and in this case its constitutionality is controverted; (4) that the rule of *damnum absque injuria* has no application to this case.

The plaintiff contends that Fourth avenue was a public street at the time the Harlem Railroad Company, which is the lessor of the Central and Hudson, was organized.

Twenty-four feet of Fourth avenue, as it was then called, in front of the premises in question, were conveyed to the city July 24th, 1827, by Poillon.

In January, 1832 (the Harlem Railroad Company having been incorporated in 1831), Poillon conveyed to the Harlem Railroad
Company 24 feet in Fourth avenue, but at that time he had
173 nothing to convey; he also refers in that conveyance to, and sanctions the map of New York, filed by the commissioners in 1811 under the act of 1807.

So far as these premises are concerned, it would seem as if the only right the Harlem Railroad Company acquired in the street, if any, was a prescriptive one, that would be no broader than its actual occupation (Lewis case, 162 N. Y., 202).

It is true that Poillon's deed to the city was never recorded, but this was not essential in order — create a highway. (Driggs *vs.* Phillips, 103 N. Y. 77.) Furthermore, the Harlem Railroad Company could not be regarded as a purchaser in good faith and for a valuable consideration, and under the provisions of its charter and its agreement with the city, and the ordinance of the board of aldermen following the agreement, it would seem to have entered upon Fourth avenue under all the restrictions in these various documents contained, and was in no sense the exclusive owner of the fee of the street, getting title from a private grantor.

The charter of the company is found in the Laws of 1831. The agreement bears date January 9th, 1832, and the ordinance was passed by the board of aldermen on January 20th, 1832.

In less than twenty years after any of these dates the city began condemnation proceedings to widen Fourth avenue, which was then 100 feet wide, and it was proposed to add twenty feet on each side, which was condemned, and the 100 feet, representing the old street was marked "ceded." It does, however, appear in some of these litigations that a decree of condemnation went in form against the Harlem Railroad Company as to the portion of the street occupied by it, declaring a condemnation in consideration of one dollar. This report was confirmed sometime in the year 1850.

The changes in Fourth avenue, as it was then called, and
174 the railroad structure under the act of 1872, resulted in a new state of affairs as to the grade of the tracks, both on viaducts and in cuts, which was not completed until 1878. It, therefore, follows that the contention of the defendants, as to undisputed title in the avenue, in front of the plaintiff's premises, cannot be maintained.

The claim that the act of 1892 is unconstitutional cannot be sustained.

If it be true that the defendants have no legal right, by reason of grant or prescription, to erect this steel viaduct to the height of 31 feet in front of the premises in question, the effect of the act of 1892 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of light, air and access have been invaded.

The mere fact that the act does not provide for compensation has no controlling effect. The legislative sanction to construct what would otherwise be a nuisance in a public street does not imply the power to take the easements of abutting owners, which are property, without compensation.

The fundamental error in the Fries case is the assumption that the doctrine of *damnum absque injuria* is applicable.

In the prevailing opinion in that case the learned judge said: "So

we have the case of a change of grade in a street, which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass."

If this statement was correct, it would be too clear for argument that the doctrine of *damnum absque injuria* would apply to this case.

The fact is that there was no change of the grade in Park
175 avenue. The title of chapter 339 of the Laws of 1892 reads: "An act to regulate, improve and enlarge Park avenue above 106th street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, *and for the elevation of said railroad structure, and for changing the grade of said railroad*, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary *by reason of such change in structure and grade and increased elevation of bridge* and for other purposes."

It is profitable at this point to consider in detail the history of this act.

The Federal Government determined to raise the height of the bridge which was in use by the railroad companies. The State of New York, as in duty bound, passed this act in question to carry out the change which Congress had decided should take place.

This act in brief directed that the grade of the Harlem Railroad Company's track should be raised between 106th street and the Harlem river. This was done in order to accommodate it to the new bridge.

The mayor of the city of New York was authorized by section thirteen to appoint a board to be known as "The board of the Park Avenue improvement above 106th street," whose duty it was to execute contracts and superintend the construction of said improvement. Upon the completion of the work the counsel to the corporation of the city of New York was required by section sixteen to apply to the special term of the supreme court in the first department for the appointment of commissioners to determine the
176 area of assessment to raise money to pay for the bonds to be issued by the city in payment of its share of the work.

The act provided that the city of New York should pay one-half and the railroad company the other half of the cost of this work if it did not exceed a million five hundred thousand dollars; if it exceeded that amount the railroad company was to pay the entire excess.

As I understand the Fries case, the majority of the court held (1) that this was work of a public nature, and that the railroad company was not liable for injury to the easements of light, air and access unless there was a want of skill, or negligence, in the performance of the work; (2) that the principles of law relating to the change of grade of streets, when lawfully made, are applicable to

this situation, and that the doctrine involved in the elevated railroad cases has no application.

The act upon its face shows that the legislature did not consider it was providing for a public work for which the State was to be liable. The provision that a small portion of the city and the railroad company shall pay between them the cost of this work, and if it exceeded a certain sum the excess should be paid by the railroad company, is conclusive evidence that it does not contemplate a public work inflicting damages which can only be recovered under a special provision of law, or by showing negligence or want of skill in the performance thereof.

The raising of the bridge by act of Congress contemplated, it is reasonable to suppose, the making of the navigable tide waters of the Harlem river accessible to vessels of greater draught, with taller masts and smokestacks, thereby benefiting the city of New York and incidentally the great railroad corporations using this bridge, they being interested in the growing prosperity of the municipality and the improved facilities for entering the city of New York by land and water.

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These considerations and the details of the act already referred to, lead me to the conclusion that this work was not of the character assumed by the prevailing opinions in the Fries case. If it were of that character, then it was unjust, and even unconstitutional for the legislature to have imposed any portion of the costs of this work upon the railroad corporations and a small section of the city of New York included in an area of assessment to be fixed by commissioners.

We thus have a situation presented similar to that in the elevated railroad cases, to wit: An elevated structure in the center of a public street, extending in places to the height of thirty-one feet, for the express purpose of elevating the railroad tracks so as to connect with the new bridge.

In my opinion to hold that the act of 1892 provides for raising the grade of Park avenue, is judicial legislation, and introduced in the Fries case a fact not disclosed by the act itself, and not discussed at our bar when that case was argued.

These cases present a situation covered by the case of Reinning *vs.* N. Y., L. & W. Ry. Co. (128 N. Y., 157). While the case cited does not present facts similar to the one at bar, yet the principle involved is precisely the same.

It was there held that a municipality could not, under the guise of exercising the power to alter the grade of a street, appropriate a part of the street practically to the exclusive use of a railroad company and cut off abutting owners without compensation from using any part of it in the accustomed way. In other words, this was a limitation of the power of the common council conferred upon it by the legislature in the city charter of Buffalo.

Judge Andrews, in applying the law of elevated railroad cases, as laid down in the Story case, said: "It is no longer open to debate in this State that owners of lots abutting on a

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street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation."

It was expressly held in the case cited that the erection of an embankment in the street, and running parallel therewith, and occupied by a railroad company, was not a change of the grade of the street.

That the legitimate change of the grade of a street, to the damage of abutting lot owners, is damage without injury, is the settled law of this State, but it involves a principle that has been condemned in many jurisdictions, and the hardship of which has been cured in some of the States by constitutional amendment providing for the payment of such damages. It is a doctrine which ought not to be extended.

I am of opinion that the law controlling the elevated railroad cases is applicable here and that the decision in the Fries case reversed a rule of property law under which millions of dollars have been paid out by the elevated railroad companies to abutting owners who had no title to the street.

The New York and Harlem Railroad Company is not vested with any title in Park avenue that permits it as the owner of real estate to erect this elevated structure without regard to the injury it may work upon the easements of light, air and access enjoyed by abutting owners. They must settle for damages caused by so much of the structure as exceeds established user.

In several of the cases now before us it appears that the
179 city received a conveyance of the fee before the railroad company took the deeds from grantors, who practically had nothing to convey. In another case there is a title under condemnation proceedings against an infant in 1830, presumably securing to the railroad company the right to operate its road on the strip twenty-four feet wide.

The details of the railroads' title were carefully and elaborately examined in the Lewis case (*supra*).

I am of opinion that this invasion of the easements of abutting owners has vested in them a valid claim against the railroad company, and if this court adheres to its decision to the contrary, on the ground that it was a public work ordered by the State, then these damages are a valid claim against the State.

I have no disposition to urge, unduly, the reconsideration of the principles of law laid down in the Fries case. I understand that the court desires a full and free discussion of this entire question. I shall be content if a result is reached in these cases adverse to the plaintiffs, so long as I place myself on record as dissenting, on the ground that it practically reverses the Lewis case and adopts a principle that is at war with the long line of decisions in the elevated railroad cases and the established law of the State.

If this judgment is reversed it should be without costs.

I vote for affirmance.

CULLEN, *J.* (dissenting):

I concur in the opinion of Judge Bartlett and dissent from the decision about to be made. I feel that I am not precluded from taking this course by the previous decisions of this court, for against the authority of the Fries case may be fairly set off that of
180 the Lewis case. But the court having on this appeal re-examined the whole question involved in both the cases cited, and determined that the plaintiff is not entitled to compensation for the injuries to his property complained of, I must hereafter subordinate my judgment to that of the majority, and shall regard subsequent discussion of the question as foreclosed by the action of the court in the present case.

Haight, Martin and Werner, J. J., concur with Parker, Ch. J.; Bartlett, J., reads dissenting opinion, and Cullen, J., concurs in memorandum; Gray, J., not sitting.

Judgment reversed, &c.

181 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, possessors of the return and record in the action in which Henry Muhlker is plaintiff and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company are defendants, Greeting;

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the court of appeals in the State of New York, wherein final judgment upon return from the supreme court of the State of New York was rendered February 25, 1903, that being the highest court of law and equity of the said State in which a decision could be had in the suit or action between Henry Muhlker, plaintiff below and plaintiff in error, and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants below and defendants in error, and which has been remitted to said supreme court for execution and is now before you or some of you in said court; wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said Henry Muhlker, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,
182 that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concern-

ing the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27" day of July, in the year of our Lord one thousand nine hundred and three.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the United States Circuit Court
for the Southern District of New York.

Allowed by

ALTON B. PARKER,
Chief Judge of the Court of Appeals,
of the State of New York.

183 [Endorsed:] U. S. Supreme Court. Henry Muhlker, plaintiff in error against The N. Y. & Harlem R. R. Co. *et al.*, defendants in error. Writ of error. Bushby & Berkeley, attorneys for plaintiff in error. Office and post office address, 220 Broadway, borough of Manhattan, New York city. Rec'd July 29th, 1903. Filed Jul- 29, 1903. Service of a copy of the within writ of error with notice of allowance is hereby admitted. Dated New York, July 27, 1903. Ira A. Place, attorney and solicitor for defendants in error, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

Endorsed on cover: File No. 19038. New York supreme court. Term No. 387. Henry Muhlker, plaintiff in error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company. Filed August 1st, 1903.